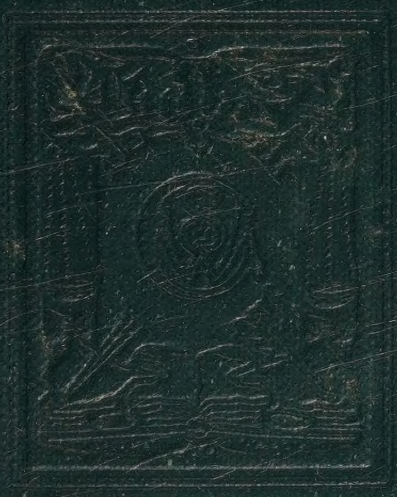

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HYPOTHEC.

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Section 1.—Definition.

1. A hypothec is a real right in security over a particular subject, or class of subjects, allowed to remain in the possession of the debtor. In this respect it is distinguished from a right of pledge or lien, to the completion of which it is essential that the subject be transferred to the possession of the creditor. It is distinguished from a preferable debt in respect that it confers a right over a particular subject, and not a general preference in the distribution of the debtor's estate. A hypothec may be legal, *i.e.* implied by law in certain relations of parties, or conventional, *i.e.* established by contract, but the only hypothecs of the latter class which are recognised in the law of Scotland are bonds of bottomry and respondentia (see Maritime Liens). With these exceptions, a mere agreement that a particular subject should be hypothecated to a creditor is ineffectual, that is to say, it confers no preference over the subject in a question with the general creditors of the debtor.[1] Legal hypothecs are recognised in favour of (1) a law agent; (2) a landlord; (3) a superior; and (4) certain creditors in maritime cases.

[1] Stair, i. 13, 14; Ersk. iii. 1, 34; *M'Gavin* v. *Sturrock's Tr*, 1891, 18 R. 576.

Section 2.—Hypothec of Law Agent.[1]

Subsection (1).—*Hypothec over Expenses.*

2. A law agent who has been employed to conduct an action in which his client has obtained a decree for expenses has a right of hypothec over the expenses found due, in security of his account for conducting the action. In the Court of Session this is recognised as a common-law right;[2] in the Sheriff Court it is provided by the Sheriff Courts (Scotland) Act, 1907,[3] that the Sheriff, on application, may, if he thinks fit, allow decree to go out in the name of the agent.

Subsection (2).—*Charging Order.*

3. The agent has no hypothec at common law over the subject recovered or vindicated by his client in the litigation, but by statute it is declared to be within the discretion of the judge before whom any proceeding is taken, to declare the law agent employed therein to be entitled to "a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action."[4] All acts done or deeds granted by the client (except acts or deeds in favour of a *bona fide* purchaser) are declared to be null and void in competition with the law agent's right under this charge.[4] The granting of an order under this section is a matter within the discretion of the Court.[5] It must be applied for before the client has disposed of the property to a *bona fide* third party, and it is barred by his sequestration.[6] But it may be granted after the property in question has been arrested by another creditor of the client, and, if granted, will confer on the law agent a right preferable to that of the arrester.[7] It has been allowed to the Glasgow agent, in Court of Session proceedings.[8]

Subsection (3).—*Nature of Right over Expenses.*

4. The right of a law agent over the expenses is of the nature of an implied assignation, which he may put in force by taking decree in his own name. He is held to have a *jus quæsitum* in the expenses, on a finding for them being pronounced, which his client is not entitled to disappoint by compromising the claim, and which is not affected by

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[1] See Begg on Law Agents, 2nd ed., p. 170; Maclaren on Expenses, p. 256.
[2] Bell's Prin., s. 1396.
[3] 7 Edw. VII. c. 51, Schedule I. s. 99.
[4] Law Agents and Notaries Public Act, 1891, 54 & 55 Vict. c. 30, s. 6.
[5] *Carruthers' Tr.* v. *Finlay & Wilson*, 1897, 24 R. 363.
[6] *Tait & Co.* v. *Wallace*, 1894, 2 S.L.T. 261.
[7] *Automobile Gas Producing Co.* v. *Caledonian Rly. Co.*, 1909, 1 S.L.T. 499.
[8] *Bannatyne, Kirkwood, France & Co.*, 1907 S.C. 705.

the diligence of the other creditors of the client, or by his sequestration.[1] The fact that the client is solvent and able to pay his agent is not a good objection to an application by the agent for decree in his own name.[2]

Subsection (4).—*Enforcement of Hypothec.*

5. The agent may render his hypothec over expenses effectual by moving for decree in his own name, which, subject to the control of the Court in exceptional cases,[3] will be granted as a matter of course, and he thereby becomes directly the creditor of the party liable in expenses.[4] He may also allow decree to go out in the name of the client, and yet preserve his hypothec by giving notice of his claim to the opposite party, provided this is done before any competing right has been completed. Such notice is not excluded by the bankruptcy of the client,[5] but is excluded by payment to the client,[6] by arrestment by a third party,[7] or by the establishment and assertion of a right in the opposite party to compensate the expenses by a debt due to him by the client.[8]

Subsection (5).—*Compensation by Party Liable in Expenses.*

6. As a general rule, a party who is found liable in expenses cannot plead compensation on a debt due to him by the party to whom these expenses are found due, as a bar to the agent of that party obtaining decree in his own name.[9] But if the result of the action is to establish a debt due by the party to whom expenses are found due, that debt will found a plea of compensation even in a question with the adversary's law agent.[10] If cross-decrees for expenses are pronounced in the same action, either party may plead compensation, and the opposite agent is not then entitled to have decree in his own name, even although his client is on the poor's roll.[11] Recent cases have extended this rule. It is still the law that if A. and B. are found liable to each other in expenses in two entirely separate actions, A. cannot plead compensation in a question with B.'s law agent.[12] But if the actions in question relate to the same dispute, if they are *partes ejusdem negotii*, compensation will

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[1] *Barr* v. *Wotherspoon*, 1850, 13 D. 305; *Hunter* v. *Pearson*, 1835, 13 S. 495; *Pollard* v. *Galloway and Nivison*, 1881, 9 R. 21.

[2] *Russel* v. *Greig*, 1826, 4 S. 403.

[3] *Bloe* v. *Bloe*, 1882, 9 R. 894.

[4] *Black* v. *Kennedy and Cameron*, 1825, 4 S. 124; *M'Creadies* v. *Douglas*, 1882, 10 R. 108.

[5] *M'Tavish* v. *Pedie*, 1826, 4 S. 704; and 1828, 6 S. 593.

[6] *Fleeming* v. *Love*, 1839, 1 D. 1097, per Lord Mackenzie.

[7] *Stephen* v. *Smith*, 1830, 8 S. 847.

[8] *Mackenzie* v. *Ross*, 1823, 2 S. 401; *Fleeming*, *supra*.

[9] Bell's Prin., s. 1390; *Miller* v. *Geils*, 1848, 10 D. 1384.

[10] *Grieve's Trs.* v. *Grieve*, 1907 S.C. 963; overruling *Munro* v. *Bothwell*, 1846, Arkley 118.

[11] *Graham* v. *Macarthur*, 1826, 5 S. 49; *Gordon* v. *Davidson*, 1865, 3 M. 938; *Macgillivray* v. *Mackintosh*, 1891, 19 R. 103.

[12] *Strain* v. *Strain*, 1890, 17 R. 566; *Fine* v. *Edinburgh Life Assurance Co.*, 1909 S.C. 636; *Holt* v. *National Bank of Scotland*, 1927, S.L.T. 664.

be allowed, whether they could have been conjoined or not.[1] Thus, in *Lochgelly Iron Co.*,[1] a workman sued his employers for damages for personal injury. The defenders were assoilzied, and found entitled to expenses, on the ground that the pursuer had elected to take compensation under the Workmen's Compensation Act, 1897. Subsequently, in proceedings relating to that compensation, expenses were found due to the workman by the employers. His agent moved for decree in his own name. It was refused, on the ground that the employers had a right of compensation in respect of the expenses found due to them, as both decrees had been pronounced in relation to the same subject of dispute.

Subsection (6).—*Right of Agent to Proceed with Action.*

7. Questions of some difficulty arise as to the right of a law agent, in virtue of his hypothec, to have himself sisted as a party to the action, and to proceed with it in the event of its being abandoned or settled by the client. His right to do so is not absolute; that is, he is not entitled to proceed with litigation merely on the ground that expenses have been incurred and there is a probability of success.[2] The following cases have been laid down as those in which the agent is entitled to proceed with the action: (1) where expenses have been actually found due; (2) where expenses follow as a natural consequence from an interlocutor already pronounced; (3) where the litigants have entered into a compromise for the purpose of defeating the agent's claim.[3]

8. The first rule may be illustrated by a case where, on decree for expenses having been pronounced in the Sheriff Court, the agent was held entitled to be sisted as a respondent in an appeal to the Court of Session, which his client did not think fit to oppose.[4] In *Ammon* v. *Tod* [5] decree with expenses had been pronounced against the defender in the Sheriff Court. Pending an appeal the pursuer accepted payment of a sum covering his claim and expenses. On a motion by the defender in the Court of Session for decree of absolvitor, it was held that the pursuer's agent was entitled to be sisted as a party, and to obtain decree as agent disburser for the expenses found due in the Sheriff Court. In the application of the second case the agent has been allowed to proceed wherever an interlocutor has been pronounced which would, in ordinary circumstances, be followed by a decree for expenses. Thus where a bill of suspension and liberation was passed; [6] where in an action for aliment interim aliment was awarded; [7] and where, in an action by a woman

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[1] *Paolo* v. *Parias*, 1897, 24 R. 1030; *Oliver* v. *Wilkie*, 1901, 4 F. 362; *Lochgelly Iron Co.* v. *Sinclair*, 1907 S.C. 442.

[2] *Mintons* v. *Hawley & Co.*, 1882, 20 S.L.R. 126.

[3] *M'Lean* v. *Auchinvole*, 1824, 3 S. 190; adopted in *Ammon* v. *Tod*, 1912 S.C. 306.

[4] *Fergusson, Halliby & Co.* v. *Richardson*, 1826, 4 S. 814; see also *Sloss* v. *Kennedy*, 1823, 2 S. 344; *Barr* v. *Wotherspoon*, 1850, 13 D. 305.

[5] 1912 S.C. 306.

[6] *M'Lean* v. *Auchinvole*, 1824, 3 S. 190.

[7] *M'Gregor & Barclay* v. *Martin*, 1867, 5 M. 583.

who had divorced her husband, concluding for *jus relictæ*, the pursuer's claim was remitted to an accountant [1]—the agent has been held entitled to proceed. But where a party sued his father's executors for *legitim*, and they rested their defence on the ground that he had renounced *legitim*, and also that he had received payments sufficient to extinguish it, it was held that, when the action was settled after an interlocutor repelling the plea of renunciation and ordering an accounting had been pronounced, the agent was not entitled to proceed, as the interlocutor was not one on which a decree for expenses would naturally follow.[2]

9. To entitle an agent to proceed with an action in which no interlocutor inferring expenses has been pronounced, he must aver that the settlement between the parties was collusive, and entered into for the purpose of defeating his claim. The mere fact of a compromise for a lump sum in name of damages and expenses does not infer collusion.[3] But where a creditor brought a reduction of a deed, on the ground that it was a fraudulent preference granted within sixty days of the bankruptcy of the granter, and the action was taken out of court and referred to arbitration, and the deed was meanwhile reduced on the same ground at the instance of other creditors, it was held that the agent of the original pursuer might proceed with the reduction, in order to obtain a decree for expenses.[4] In consistorial actions at the instance of a wife the husband may be liable for her expenses, but, should she die before decree, or abandon the action, her agent is not entitled to be sisted as agent disburser; he must establish his claim against the husband in a separate action.[5]

Section 3.—Hypothec of Landlord.

Subsection (1).—*Extent of Right.*

10. The common law of Scotland recognises the right of a landlord to a hypothec for rent whether the subject let was agricultural or urban.[6] It extends to royalties payable under a lease of minerals.[7] By the Hypothec Abolition (Scotland) Act, 1880,[8] the hypothec of a landlord for the rent of land, including the rent of any buildings thereon, let for agriculture or pasture, and exceeding two acres in extent, was abolished as from 4th November 1881, with an exception in the case of rent due under any lease, bargain, or writing current at that date. As the result of this Act is that agricultural hypothec is of historical

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[1] *Cornwall* v. *Walker*, 1871, 8 S.L.R. 442.

[2] *Murray* v. *Kyd*, 1852, 14 D. 501.

[3] *M'Queen* v. *Hay*, 1854, 17 D. 107.

[4] *Tod & Wright* v. *Wilson*, 1822, 1 S. 381. See also *Cheyne* v. *Cheyne*, 1832, 10 S. 202; *Murray* v. *Kyd, supra*; *M'Queen* v. *Hay, supra*.

[5] *Clark* v. *Henderson*, 1875, 2 R. 428; *Peek* v. *Peek*, 1926 S.C. 565.

[6] Bell, Com. ii. 28; Hunter on Landlord and Tenant, 4th ed., ii. 355; Rankine on Leases, 3rd ed., p. 366; Gloag and Irvine on Rights in Security, pp. 416 *et seq.*

[7] *Liquidators of Linlithgow Oil Co.* v. *Earl of Rosebery*, 1903, 6 F. 90.

[8] 43 Vict. c. 12.

interest only, reference to it will be limited to those cases which are still of interest as illustrating the operation of urban hypothec.

Subsection (2).—*Parties Entitled to Exercise.*

11. Hypothec, so far as still existing, is available to anyone who is in the position of a landlord, and entitled to demand the rent. Thus it may be used by a heritable creditor in possession,[1] by the holder of an *ex facie* absolute disposition, a liferenter,[2] or a party who has paid the rent and obtained an assignation of the landlord's rights.[3] It cannot, however, be used as a means of creating a security over moveables, in cases where there is no real relationship of landlord and tenant between the parties. Thus where a company lent money to a firm of shipbuilders, and took from them an *ex facie* absolute disposition of their yard and the moveables therein, with a personal bond for the sum lent, qualified by a lease to the borrowers at a rent greatly in excess of that in the Valuation Roll, and a back letter declaring that the transaction was only a security and that all payments made as rent were to be ascribed in payment of interest and principal, it was held that as the parties were only nominally landlord and tenant, the lenders had no right to sequestrate the *invecta et illata* in the shipbuilding yard, in a question with the trustee in the bankruptcy of the shipbuilders.[4]

Subsection (3).—*Rent Secured.*

12. The landlord's hypothec is available for rent, whether due or only current, but not for arrears.[5] In agricultural subjects the crop was hypothecated for the rent of the year in which it was produced, at whatever term that rent might be payable,[6] but not for the rent of any other year.[7] By statute it was declared to fall if proceedings were not taken to make it effectual by sequestration within three months of the date at which the rent, or the last portion thereof, fell due.[8] Live stock was hypothecated for the rent of each year successively, and the same period of three months was allowed to the landlord to make it effectual.[9] In the same way hypothec in urban subjects secures each year's rent successively, and must be put in force within three months of the term of payment.[10]

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[1] *Railton* v. *Muirhead*, 1834, 12 S. 757.
[2] *Zuill* v. *Buchanan*, 1833, 11 S. 682.
[3] *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107.
[4] *Heritable Securities Investment Association* v. *Wingate & Co.'s Tr.*, 1880, 7 R. 1094.
[5] Bell's Prin., s. 1249; *Young* v. *Welsh*, 1833, 12 S. 233.
[6] Bell's Prin., s. 1239.
[7] *Earl of Cassilis* v. *Ramsay's Crs.*, 1816, Hume 230.
[8] 30 & 31 Vict. c. 42, s. 4.
[9] *Ross* v. *Williamson*, 1817, Hume 232.
[10] Ersk. ii. 6, 64; Bell's Prin., ss. 1240, 1277.

SUBSECTION (4).—*Subjects Covered.*

(i) *Invecta et illata.*

13. In urban leases the scope of the landlord's hypothec has been limited by the House Letting and Rating (Scotland) Act, 1911,[1] as amended (in respect to the limits of valuation of the houses included) by the Rent Restriction Act, 1920.[2] In the small dwelling-houses to which the Acts apply the hypothec is excluded from "all building material as well as all tools and implements of trade used or to be used by the occupier of a small dwelling-house, or any member of his family, as the means of his, her, or their livelihood, which are in the dwelling-house, and all such further furniture and plenishing in a small dwelling-house as the occupier may select to the value, according to the sheriff officer's inventory, of ten pounds." In the urban leases to which this provision does not apply the landlord's hypothec extends over the *invecta et illata*, *i.e.* moveables brought on to the premises. An urban lease is one where the rent is wholly or mainly paid for the buildings on the land, whether the subjects are situated in town or country.[3] Under the phrase *invecta et illata* all ordinary household furniture is included, as well as the goods for sale in a shop, and the moveable machinery and stock in trade in a manufactory. Bills, cash, notes, and ordinary wearing apparel are exempt,[4] as also are the tools necessary for the trade carried on by the tenant.[5] The sale and delivery of any article in a shop or manufactory will exclude the right of the landlord; but the mere fact of sale, without delivery, leaves the article subject to hypothec.[6] This rule is not affected by the provisions of the Sale of Goods Act, 1893,[7] whereby the property in goods sold may pass without delivery, because the hypothec of a landlord is not necessarily excluded by the fact that the article in question does not belong to the tenant, and the Act provides that its provisions shall not prejudice or affect the landlord's right of hypothec (s. 61). So when furniture was sold and paid for, but left in the shop for the convenience of the purchaser, it was held to fall under a sequestration at the instance of the landlord.[8]

(ii) *Furniture belonging to Third Parties.*

14. On the principle that a landlord is entitled to have the subjects plenished with articles which may be subject to his hypothec, furniture hired by the tenant has been decided to fall under hypothec. Thus ordinary household furniture and the table and fittings in a billiard saloon, obtained on hire, have been held to be subject to hypothec.[9] But the opinion has been expressed that furniture hired for a temporary

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[1] 1 & 2 Geo. V. c. 53.
[2] 10 & 11 Geo. V. c. 17, s. 12.
[3] Ersk. ii. 9, 6; Bell's Prin., s. 983.
[4] Bell's Prin., s. 1276.
[5] *Macpherson* v. *Macpherson's Tr.*, 1905, 8 F. 191.
[6] *Yuille* v. *Lawrie*, 1823, 2 S. 155; *Wyld* v. *Richardson*, 1832, 10 S. 538.
[7] 56 & 57 Vict. c. 71.
[8] *Ryan* v. *Little*, 1910 S.C. 219.
[9] *Wauchope* v. *Gall & Ross*, 1805, Hume 227; *Nelmes & Co.* v. *Ewing*, 1883, 11 R. 193.

purpose—for instance, chairs hired for a ball—is not subjected thereby to hypothec.[1] And it is very doubtful whether a single article, obtained on hire, is hypothecated for rent. An early decision in the affirmative has been doubted,[2] and conflicting decisions have been pronounced in the Sheriff Courts in the cases of pianos, sewing machines, and other articles in the possession of the tenant on contracts of hire.[3] In *Edinburgh Albert Buildings Co.* v. *General Guarantee Corporation*,[4] a hall was let furnished and the rent was payable in advance. The only article not belonging to the landlord was a piano, obtained by the tenant on hire-purchase. It was held that as the hall was let furnished, and the rent was payable in advance, it could not be presumed that the landlord relied to any extent on the security of the plenishing, and the piano, consequently, was not covered by the hypothec; but the Lord President (Strathclyde) expressed the opinion that *Penson* v. *Robertson* [5] was good law, and that if a single article is hired and brought into a house where all the rest of the furniture is subject to hypothec, it too falls under the hypothec.

15. Articles belonging to a third party, and placed in the possession of the tenant in the course of his trade, are not subject to the hypothec of the landlord. Thus a yachting agent undertook to exhibit pulsometers in his office on commission, and it was held that his landlord could not sequestrate the pulsometers under his hypothec, although there was nothing else in the office except a small quantity of furniture.[6] Again, the property of members of the tenant's family, living with him, is not subject to hypothec; [7] nor is the property of a lodger.[8] The case of furniture lent to a tenant gratuitously is more doubtful. The case which has usually arisen is where the tenant is deprived of his property under the Bankruptcy Statutes, and the furniture is purchased by a friend, who allows the bankrupt to retain the use of it. In one case, where the tenant had absconded and his furniture had been openly sold under Crown diligence, it was held that the purchaser did not subject it to the diligence of the landlord by allowing the family of the tenant to make use of it for nine months.[9] But in an earlier case, where creditors allowed a bankrupt to retain the use of his furniture for several weeks, it was held to be subject to hypothec.[10]

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[1] Per Lord Deas in *Adam* v. *Sutherland*, 1863, 2 M. 6.

[2] See observations on *Penson* v. *Robertson*, 6th June 1820, F.C., per Lord Shand in *Bell* v. *Andrews*, 1885, 12 R. 961.

[3] See Sheriff Court cases collected in Rankine, Leases, 3rd ed., p. 376; *Gow & Shepherd* v. *Anderson*, 1805, Hume 517; *Bottger* v. *Globe Furnishing Co.*, 1906, 14 S.L.T. 117, per Lord Johnston, Ordinary; *Smith Premier Typewriter Co.* v. *Cotton*, 1907, 14 S.L.T. 764.

[4] 1917 S.C. 239.

[5] 6th June 1820, F.C.

[6] *Pulsometer Co.* v. *Gracie*, 1887, 14 R. 316; see also Bell, Com. ii. 31.

[7] *Bell* v. *Andrews*, 1885, 12 R. 961.

[8] Per Lord Shand in *Bell*, *supra*.

[9] *Adam* v. *Sutherland*, 1863, 2 M. 6.

[10] *Wilson* v. *Spankie*, 17th December 1813, F.C.; see *Yuille* v. *Lawrie*, 1823, 2 S. 155; *Smith Premier Typewriter Co.* v. *Cotton*, 1907, 14 S.L.T. 764.

SUBSECTION (5).—*Hypothec in Mines.*

16. In leases of mines or quarries it is settled that the produce is subject to hypothec as *invecta et illata*;[1] and it is probable, though not definitely decided, that a similar hypothec over the machinery and implements would be recognised.[2] The hypothec covers either fixed rent or royalties.[3]

SUBSECTION (6).—*Assignation of Hypothec.*

17. Where a cautioner for the tenant pays the rent, the landlord is bound to assign to him his right of hypothec, and sequestration following on such an assignation is preferable to sequestration by the landlord for the rent of the ensuing term.[4] If a third party who is not a cautioner pays the rent, he is only entitled to an assignation of the hypothec if the landlord has no interest to refuse.[5] The result is that as a rule he can only obtain such an assignation at the end of a lease, as during the currency of the lease the landlord has a continuing interest to have the *invecta et illata* preserved, to afford security for the rent of the ensuing terms.

SUBSECTION (7).—*Effect of Sub-lease.*

18. In agricultural subjects hypothec was not affected by a sub-lease.[6] Urban leases differ in respect that they are assignable, in the absence of any express provision to the contrary.[7] Unless sub-letting is forbidden, the hypothec over the effects of the sub-tenant exists only to the extent of the rent due by him to the principal tenant, and can be exercised only if the rent is demanded from him by the landlord before he has paid it to the principal tenant.[8] The principal tenant, where the sub-lease has been granted in pursuance of an express or implied power to sub-let, has a hypothec over the effects of the sub-tenant for the rent due by him, which, however, he cannot make effectual by sequestration in competition with his landlord, unless he has paid or found security for his own rent.[9] Where, however, on the expiry of a sub-lease, the landlord granted a lease of the premises to the sub-tenant, it was held that sequestration brought by the principal tenant for the last term's rent, under the sub-lease, was preferable to sequestration at the instance of the landlord for the first term of the new lease.[10]

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[1] Ersk. ii. 6, 64; *Weir's Exrs.* v. *Durham*, 1870, 8 M. 725, per Lord Deas at p. 728.
[2] *Tennent* v. *Macbrayne*, 1833, 11 S. 471; *Weir's Exrs., supra; Lindsay* v. *Earl of Wemyss*, 1872, 10 M. 708.
[3] *Liquidator of Linlithgow Oil Co.* v. *Earl of Rosebery*, 1903, 6 F. 90.
[4] *Stevenson* v. *M'Culloch*, 1821, 1 S. 30.
[5] *Steuart* v. *Stables*, 1878, 5 R. 1024; *Guthrie & M'Connachy* v. *Smith*, 1880, 8 R. 107.
[6] *Steuart* v. *Stables, supra.*
[7] Bell's Prin., s. 1274.
[8] *Blane* v. *Morison*, 1785, Mor. 6232.
[9] *Stevenson* v. *Cooper*, 1822, 1 S. 312.
[10] *Christie* v. *Macpherson*, 14th December 1814, F.C.

SUBSECTION (8).—*Enforcement of Hypothec.*

19. A landlord may render his hypothec effectual (*a*) by retaining the goods on the premises, and (*b*) by attaching them by sequestration.

(i) *Retention of Goods.*

20. The former right entitles the landlord to insist on the tenant retaining on the subjects the goods which form the *invecta et illata* in an urban lease, or the crop and stocking in an agricultural lease. This right he may exercise by obtaining an interdict against the removal of the goods, or a warrant to have them brought back, if already removed. The limits of this right depend upon whether the rent is or is not actually payable. If it is, it is sufficient if enough be left to satisfy the rent; [1] if it is not, the whole subjects must be left, even if the tenant is solvent and not in arrears with his rent.[2] On the other hand, if the rent is not payable, an offer of caution for rent, interest, and penalties will entitle the tenant or any third party to remove the goods; [3] while if the rent is actually due, an offer of caution is not sufficient, and the rent must either be paid or goods sufficient to secure it left.[4] Third parties removing subjects under hypothec render themselves liable, as intromitters, to pay the rent, at least to the value of the goods removed.[5] In a case of very special circumstances, a third party intromitting with the subjects has been held responsible for the whole rent.[6]

(ii) *Warrant to Bring Goods Back.*

21. Where goods subject to hypothec are actually removed by the tenant, the landlord may obtain a warrant from the Sheriff to have them brought back. The warrant grants authority to search for and carry back the goods to the house from which they were removed, there to be sequestrated, inventoried, and secured. This warrant should not be granted without the statement of facts showing that the tenant has removed his effects clandestinely. Intimation to the tenant should be given, except in cases where it would defeat the object of the diligence.[7] The landlord will be liable in damages if he takes out such a warrant without sufficient cause.[8]

(iii) *Plenishing Order.*

22. It is a consequence of the right of hypothec that the landlord is entitled to insist on the premises let being suitably plenished, and

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[1] *Rutherford* v. *Scott*, 1736, Mor. 6226.
[2] Ersk. ii. 6, 59 ; *Preston* v. *Gregor*, 1845, 7 D. 942.
[3] Hunter on Landlord and Tenant, 4th ed., ii. 391.
[4] *Crawford* v. *Stewart*, 1737, Mor. 10531.
[5] *Barns* v. *Allan*, 1864, 2 M. 1119.
[6] *Steuart* v. *Peddie*, 1874, 2 R. 94.
[7] *Johnston* v. *Young*, 1890, 18 R. (J.C.) 6 ; *Gray* v. *Weir*, 1891, 19 R. 25 ; *M'Laughlan* v. *Reilly*, 1892, 20 R. 41 ; *Jack* v. *Black*, 1911 S.C. 691, per Lord President at p. 698.
[8] *Gray, supra ; Jack, supra.*

he may enforce this obligation by obtaining a plenishing order in the Sheriff Court.[1] Thus the tenant of a house may be ordained to furnish it, the tenant of a shop to provide a stock in trade.[2] A landlord may enforce the obligation to plenish even if he himself has removed the previous plenishing by diligence for a former term of the rent.[3] A plenishing order concludes with a warrant for the summary ejection of the tenant, on failure to pay the rent or find caution for it, and authority to the landlord to re-let the premises, but it does not put an end to the contract of lease; and the tenant is entitled, at least if the subjects remain unlet, to demand possession at any time on paying arrears of rent and plenishing the house.[4]

(iv) *Sequestration.*

23. Landlord's sequestration is the diligence by which the general security afforded by hypothec is made effectual by attaching specific subjects. It may be used either for rent actually due and payable, or in security of rent not yet due. The latter diligence is a severe measure on the part of the landlord, and will not be granted without cause shown, as, for instance, that the tenant is displenishing the subjects.[5] The goods sequestrated in urban subjects cannot be sold until the term of payment has actually arrived,[6] and if at that term the rent is paid, the landlord must meet the expense of the sequestration.[7] But sequestration in security of rent to become due is usually combined with sequestration for rent actually due.

24. A petition for sequestration for rent actually due should be presented in the Sheriff Court of the county in which the subjects are situated. The Sheriff has jurisdiction though the tenant is a foreigner, and the action is probably incompetent in the Court of Session.[8] The Small Debt Court is a competent forum if the term's rent which is claimed does not exceed £20, even although the annual rental is above that sum.[9] Sequestration is granted as a matter of course, and the effects are inventoried by an officer of Court.[10] The inventory is conclusive evidence of what falls under the sequestration, and nothing that is not inventoried is attached.[11] If a third party maintains that articles belonging to him have been inventoried, his proper course is to appear in the sequestration, and not to institute a separate action for their recovery.[12] In the analogous case of a poinding it was held that an application for interdict, after decree for the sale of the articles poinded

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[1] *Robertson* v. *Cockburn*, 1875, 3 R. 21; *Cunningham* v. *Black*, 1883, 10 R. 441.
[2] *Whitelaw* v. *Fulton*, 1871, 10 M. 27.
[3] *Macdonald* v. *MacKessack*, 1888, 16 R. 168.
[4] *Wright* v. *Wightman*, 1875, 3 R. 68.
[5] *Duffy* v. *Gray*, 1858, 20 D. 580; *M'Laughlan* v. *Reilly*, 1892, 20 R. 41.
[6] *Wells* v. *Proudfoot*, 1700, Hume 22; *Duffy*, *supra*.
[7] *Gordon* v. *Suttie*, 1836, 14 S. 954.
[8] *Duncan* v. *Lodijensky*, 1904, 6 F. 408.
[9] Sheriff Courts Act, 1907, s. 43, and Sched. I.
[10] *Ibid.*; and A.S., 11th July 1839, s. 150.
[11] *Horsburgh* v. *Morton*, 1825, 3 S. 596.
[12] *M'Kechnie* v. *Duke of Montrose*, 1853, 15 D. 623.

had been granted, was competent.[1] Where an article hired by the tenant is attached by sequestration the owner should apply to the Sheriff to have it reserved until the tenant's own goods are disposed of; if he does not take that step he has no claim of damages against the landlord, even if he has intimated that the article in question belongs to him.[2]

25. Articles which are sequestrated are *in manibus curiæ*, and any unwarrantable intromission with them is a contempt of Court.[3] If the tenant removes or sells the subjects sequestrated, he is liable to be imprisoned until he restores them or finds caution for the rent.[4] Breach of sequestration committed by a third party subjects him to liability in the value of the subjects removed, or, if he acted in knowledge of the sequestration, to liability to pay the whole rent.[5] Where, however, a landlord had sequestrated and then made an arrangement whereby the tenant was to sell the goods and account to him for the proceeds, it was held that he was not entitled, on the failure of the tenant to account for the proceeds of the sale, to revive the sequestration and refuse to allow the articles sold to be delivered to the purchaser.[6]

26. Sequestration may be followed by sale of the effects, carried out by an officer appointed by the Sheriff. An account must be lodged within fourteen days of the sale, exhibiting the amount received, the expenses of the sale, the rent due, and the difference between that amount and the sum realised by the sale.[7] The landlord is entitled to be paid the rent due to him and expenses, and the balance is paid to the tenant, but may be attached by the diligence of any creditor of his, or by the landlord for any debt not covered by the sequestration.[8] Every sequestration must be entered in a register of sequestrations, which is open to inspection on payment of a fee of one shilling.[9]

27. Where sequestration is threatened, the tenant may obtain interdict against it, on finding caution for the rent, or on consignation.[10] Where it has been granted, it will be recalled on caution being found for the rent, or on an adequate defence being stated by the tenant.

28. An improper or oppressive use of diligence under his hypothec will render the landlord liable in damages. Damages have been awarded both for unnecessary use of diligence, where a warrant to carry goods back was obtained when the tenant had removed them openly and before the rent was payable,[11] and for oppressive proceedings in carrying out the sequestration, where a grossly unnecessary amount of goods was sequestrated, and the sale was carried out in a manner which precluded

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[1] *Jack* v. *Waddell's Trs.*, 1918 S.C. 73.
[2] *M'Intosh* v. *Potts*, 1905, 7 F. 765.
[3] Bell's Prin., s. 1244.
[4] *Goldie* v. *Oswald*, 1839, 1 D. 426.
[5] *Jack* v. *M'Caig*, 1880, 7 R. 465.
[6] *Mackenzie* v. *Lord Lovat*, 1883, 20 S.L.R. 694.
[7] A.S. 11th July 1839, s. 150; Sheriff Courts Act, 1907, s. 107, Sched. I.
[8] *M'Farlane* v. *Forrester*, 1823, 2 S. 505.
[9] 30 & 31 Vict. c. 42. s. 7.
[10] *Gray* v. *Renton*, 1840, 3 D. 203.
[11] *Gray* v. *Weir*, 1891, 19 R. 25; cp. *M'Laughlan* v. *Reilly*, 1892, 20 R. 41; *Jack* v. *Black*, 1911 S.C. 691.

a fair price being obtained.[1] If, however, sequestration is taken out in the Small Debt Court, irregularities before decree will not found an action of damages, because a small debt decree is final, and to allow an action of damages would simply mean instituting an appeal in another form.[2] But irregularities in carrying out the decree may subject the landlord in damages.[3]

Subsection (9).—*Hypothec in Competition with other Rights.*

29. In competition with other claims on the tenant's estate, the landlord's hypothec is preferable to any private diligence,[4] or to the trustee in the tenant's sequestration.[5] It is not affected by the liquidation of a company.[6] It is postponed to diligence at the instance of the Crown,[7] and to the deathbed and funeral expenses of the tenant.[8] The Preferential Payments in Bankruptcy Act, 1888[9] specifies certain debts as preferable to the landlord's claim for rent in a bankruptcy or in the liquidation of a company. These debts are parochial and local rates for the last twelve months before bankruptcy, income tax, not exceeding one year's assessment, the wages of any clerk or servant for services rendered within four months of the bankruptcy and not exceeding £50, and the wages of any workman or labourer in respect of services rendered within two months of the bankruptcy and not exceeding £25. But the provisions of this Act, with regard to bankruptcy procedure, are probably not applicable to Scotland, though those relating to the liquidation of a company are.[10] Similar rules are provided by the Companies (Consolidation) Act, 1908,[11] s. 209, in terms which render it doubtful whether the section applies to hypothec. A person in the position of the secretary of a company is not a clerk or servant within the meaning of these provisions.[12]

Section 4.—Hypothec of Superior.

30. A superior has a right of hypothec for his feu-duties, extending over the crop and stocking in agricultural, and the *invecta et illata* in urban subjects. It is preferable to the hypothec of the landlord.[13] It is probably not affected by the Hypothec Abolition Act, 1880, which

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[1] *M'Leod* v. *M'Leod*, 1829, 7 S. 396; *Robertson* v. *Galbraith*, 1857, 19 D. 1016; *M'Intosh* v. *Potts*, 1905, 7 F. 765.

[2] *Crombie* v. *M'Ewan*, 1861, 23 D. 333.

[3] *Gray* v. *Smart*, 1892, 19 R. 692.

[4] *Philips* v. *Easson*, 1807, Hume 228.

[5] Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 119.

[6] *Anderson's Trs.* v. *Donaldson*, 1908 S.C. 38; see Companies (Consolidation) Act, 1908, s. 213.

[7] *Ogilvie* v. *Wingate*, 1791, Mor. 7884; rev. 1792, 3 Pat. 273.

[8] *Rowan* v. *Bar*, 1742, Mor. 11852; *Drysdale* v. *Kennedy*, 1835, 14 S. 159.

[9] 51 & 52 Vict. c. 62.

[10] *Liquidators of Scottish Drug Depot* v. *Fraser*, 1905, 7 F. 646, per Lord Low (Ordinary).

[11] 8 Edw. VII. c. 69.

[12] *Liquidator of "Scottish Poultry Journal" Co.*, 1896, 4 S.L.T. 167.

[13] Stair, ii. 4, 7; Ersk. ii. 6, 63; Bell's Prin., s. 698; *Yuille* v. *Lawrie*, 1823, 2 S. 155.

deals only with the hypothec of a landlord. As, however, the superior is entitled to poind the ground, and thus secure a preference over the moveables,[1] this hypothec is rarely put in force, and there are few instances in which it has been recognised by the Courts.[2]

Section 5.—Maritime Hypothecs or Liens.

Subsection (1).—*Nature of Right.*

31. The hypothecs which are recognised as extending over a ship are usually known as maritime liens.[3] They are, however, not liens in the ordinary sense of the word, but hypothecs, inasmuch as the right they confer is a right in security over a ship, without possession.[4] There are few instances of the exercise of such maritime hypothecs in Scotland; but in a recent case it was laid down by the House of Lords that the maritime law administered by Courts of Admiralty in England and Scotland was the same, and that a maritime lien, if recognised in England, was to be held to be part of the law of Scotland.[5] A maritime lien or hypothec gives a creditor a real right over the ship and freight, but not over the cargo.[6] This right the creditor may render effectual by arresting the ship under the Admiralty jurisdiction of the Court of Session or Sheriff Court, or by claiming a preference in any action or diligence at the instance of other creditors. A maritime hypothec is preferable to a mortgage of the ship,[7] or to the right of a purchaser without notice of its existence.[8] In competition with the possessory lien of a ship carpenter, for repairs executed on the ship, it has been held that the carpenter takes the ship into his dock subject to any hypothec by which she may then be burdened, and that he is therefore postponed to a hypothec for salvage services already performed.[9] The question whether a particular debt confers a lien is to be determined by the law of the place where the ship is attached.[10]

Subsection (2).—*Personal Liability a Condition of Hypothec.*

32. After some doubt, it would seem now to be settled that there cannot be a hypothec over a ship, with the exception of the hypothec of seamen for their wages, unless there is a debt for which the owner

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[1] Bell's Prin., s. 699.

[2] *Yuille* v. *Lawrie*, 1823, 2 S. 155; *Anderson's Trs.* v. *Donaldson*, 1908 S.C. 38; 1907, 15 S.L.T. 409.

[3] See Abbott on Shipping, 14th ed., 1012; M'Lachlan on Shipping, 6th ed., p. 50; Marsden on Collisions at Sea, 8th ed., p. 84, Carver on Carriage by Sea, 7th ed., p. 320; Gloag and Irvine on Rights in Security, p. 437.

[4] See opinion of Jervis C.J. in *The "Bold Buccleugh,"* 1851, 7 Moo. P.C.C. 267, at p. 284.

[5] *Currie* v. *MacKnight*, 1895, 22 R. 607; affd. 1896, 24 R. (H.L.) 1.

[6] *The "Orpheus,"* 1871, L.R. 3 A. & E. 308.

[7] *The "Aline,"* 1839, 1 Wm. Rob. 111.

[8] *The "Bold Buccleugh,"* 1851, 7 Moo. P.C.C. 267, approved by Lord Watson; *The "Kong Magnus,"* [1891] P. 223.

[9] *The "Gustaf,"* 1862, Lush. 506; *The "Immacolata Concezione,"* 1883, 9 P.D. 37.

[10] *Clark* v. *Bowring & Co.*, 1908 S.C. 1168.

of the ship is personally liable. Thus the hypothec of a master for his disbursements will not attach the ship unless the owner is personally liable for the debt.[1] And there is no hypothec for a collision which took place when the ship was under the control of a compulsory pilot, or of the harbour authorities.[2] An exception to this rule has, however, been admitted in the case of a collision while the ship is in the hands of charterers, in which case a hypothec has been allowed although the owner is not personally liable.[3] Maritime hypothecs may arise either from delict or from implied contract. The hypothec for collision is the only instance of the former class; in the latter the hypothec of seamen for wages, of the master for wages and disbursements, of a salvor and a party who has repaired the ship or supplied necessaries in a foreign port, are recognised.

Subsection (3).—*Hypothec for Collision.*

33. The hypothec or maritime lien for collision is available to the owner of a ship which has been injured in a collision by some fault in navigation for which the owner of the colliding ship is responsible. It has recently been held that it is known in the law of Scotland.[4] It is applicable not only in the case of an actual collision between two ships, but also over a ship which, by improper navigation, causes a collision between two other ships,[5] or over a wreck which a ship has run into owing to want of proper lighting.[6] But it will not attach for a wrongful act, not of the nature of a collision, whereby one ship is injured through the agency of the crew of another. Thus where a man, crossing over another ship to reach his own, fell into the hold, and brought an action of damages on the ground that his fall was due to want of proper precautions in the ship in which he fell, it was held that he had no maritime hypothec.[7] Again, in a recent case, two ships were attached by ropes to the same quay, the ropes of the outer ship passing over the deck of the inner. The master of the inner ship, finding the harbour unsafe, desired to get out to sea; and as the outer ship declined to move, he cut her ropes, with the result that she drifted on shore and was injured. Her owner obtained decree for damages against the owner of the ship which had cut the ropes, and claimed a hypothec over her in a multiplepoinding, in which the opposing claimant was a mortgagee. It was held that although the owner of the ship was responsible for the damage done by the master, yet it was not damage in which the ship was a direct agent, and therefore no maritime hypothec arose.[8]

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[1] *The "Castlegate,"* [1893] A.C. 38.
[2] *The "Parlement Belge,"* 1879, 5 P.D. 197; *The "Utopia,"* [1893] A.C. 492.
[3] *The "Lemington,"* 1874, 2 Asp. M.C. 475; *The "Tasmania,"* 1888, 13 P.D. 110. But see opinion of Lord Watson in *The "Castlegate,"* [1893] A.C. 38, at p. 52.
[4] *Currie* v. *MacKnight,* 1896, 24 R. (H.L.) 1.
[5] *The "Sisters,"* 1876, 1 P.D. 117; *The "Industrie,"* 1871, L.R. 3 A. & E. 303.
[6] *The "Utopia,"* [1893] A.C. 492.
[7] *The "Theta,"* [1894] P. 280.
[8] *Currie* v. *MacKnight, supra.*

34. The maritime lien for collision may be enforced even after the ownership of the hypothecated ship has entirely changed;[1] but it must be put in force at the first reasonable opportunity, and will be lost by undue delay.[2] But an arrestment of a foreign ship eleven years after the collision, during which time she had on forty-seven different occasions been in ports of the United Kingdom, was held, in the circumstances, not to have been attended by unreasonable delay.[3]

Subsection (4).—*Hypothec for Seamen's Wages.*

35. The earlier cases in Scotland recognised a hypothec in favour of seamen over the freight, but negatived any right over the ship not founded on possession.[4] But a hypothec over the ship for wages has been recognised in a modern case, as it is in England.[5] This hypothec cannot be given up by the seamen by contract,[6] and it attaches if wages are due for service rendered to the ship, whether the owner is personally liable for such wages or not.[7] A party advancing money to pay seamen's wages acquires their lien, unless he advances it on the credit of the owners and not in reliance on the ship.[8] The master has the same lien for his wages as the seamen, even although he may be a part owner of the ship.[9] It was held in England that the master has no maritime lien for his disbursements,[10] with the result that a statutory lien was introduced.[11] Hypothec for disbursements can only be exercised for debts for which the owner is responsible, whereas the hypothec of the master for wages, like that of the seamen, can be exercised for services done to the ship, whether the owner is personally liable therefor or not.[12]

Subsection (5).—*Hypothec for Salvage, etc.*

36. A maritime hypothec is allowed for salvage,[13] but not for towage.[14] There is no hypothec for necessaries supplied at a home port, whether to a British or a foreign ship.[15] A hypothec for repairs and necessaries supplied in a foreign port is recognised by the institutional writers,[16] but would appear to be negatived by an English case.[17]

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[1] *The "Bold Buccleugh,"* 1851, 7 Moo. P.C.C. 267.
[2] *The "Kong Magnus,"* [1891] P. 223. [3] *Ibid.*
[4] *Seamen of "Golden Star,"* 1682, Mor. 6259; *Sands* v. *Scott*, 1708, Mor. 6261.
[5] Bell, Com. i. 562; *The "Louisa Bertha,"* 1850, 14 Jur. 1006; *The Queen* v. *The Owner of S.S. "Michigan,"* 1890, 25 Q.B.D. 339; *Clark* v. *Bowring & Co.*, 1908 S.C. 1168.
[6] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 156.
[7] *The "Castlegate,"* [1893] A.C. 38. [8] *Clark* v. *Bowring & Co.*, 1908 S.C. 1168.
[9] *The "Feronia,"* 1868, L.R. 2 A. & E. 65; Merchant Shipping Act, 1894, s. 167.
[10] *The "Sara,"* 1889, 14 App. Cas. 209.
[11] 57 & 58 Vict. c. 60, s. 167; see *The "Orienta,"* [1895] P. 49.
[12] *The "Castlegate,"* [1893] A.C. 38. [13] 57 & 58 Vict. c. 60, s. 547.
[14] *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 1889, 43 Ch. D. 241
[15] *Hamilton* v. *Wood*, 1788, Mor. 6269; affd. 1780, 3 Pat. 148; *The "Henrich Bjorn,"* 1886, 11 App. Cas. 270; *Clydesdale Bank* v. *Walker & Bain*, 1926 S.C. 72.
[16] Ersk. iii. 1, 34; Bell's Prin., s. 1398.
[17] *The "Rio Tinto,"* 1884, 9 App. Cas. 356.

SUBSECTION (6).—*Preference of Maritime Hypothecs* inter se.

37. In a competition between maritime hypothecs, the lien of seamen for their wages is preferable to a claim for salvage, or to a lender on a bottomry bond.[1] Claims for salvage rank according to date, the posterior being preferable to the prior claim, in respect that by it the subject of the prior claim is preserved.[2] The hypothec for collision is preferable to the hypothec for wages, at least in the case of a foreign ship,[3] or where the owner is solvent.[4] It is, however, doubtful whether this rule would apply in the case of a bankrupt owner of a British ship, especially in a question with the wages of seamen who were not responsible for the collision.

SUBSECTION (7).—*Transmission of Hypothec to Third Parties.*

38. In *Clark* v. *Bowring*,[5] opinions were expressed that, when a third party pays seamen's wages in reliance on the credit of the ship, the right of hypothec, with the preference attaching to it, transmits to him without any formal assignation. It was not necessary to decide the point, as it was proved that the advance in question had been made in reliance on the credit of the owners, and not of the ship, and in an English case, where *Clark* was not cited, Hill J. held that the hypothec does not pass without Court proceedings.[6] In a subsequent Scottish case the opinions were that the point was still open.[7]

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[1] *The* "*W. F. Safford*," 1860, Lush. 69; *The* "*James W. Elwell*," [1921] P. 351.
[2] M'Lachlan on Shipping, 4th ed., 740.
[3] *The* "*Elin*," 1883, 8 P.D. 129.
[4] See opinion of Dr Lushington in *The* "*Linda Flor*," 1857, Swa. Ad. 309.
[5] 1908 S.C. 1168.
[6] *The* "*Petone*," [1917] P. 198.
[7] *Clydesdale Bank* v. *Walker & Bain*, 1926 S.C. 72.

ICE CREAM SHOPS.

See SHOPS.

IDENTIFICATION.

See PROOF.

IDIOT.

See INSANITY AND LUNACY.

IGNORANTIA JURIS NEMINEM EXCUSAT.

See ERROR.

ILLEGAL AND IMMORAL CONTRACTS.

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Section 1.—Introductory.

39. The general freedom of parties to contract as they please and in what manner they please is limited by conditions relating to considerations of morality and public policy. A contract may be unenforceable from its being expressly prohibited, from its purpose being illegal or immoral, or from its being the result of an illegal act.[1] It is *pars judicis* to take the exception even though it be not pleaded.[2] The unlawful nature of the contract may arise from the provisions of the common law or from the operation of statute.

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[1] Gloag on Contract, chap. xxx. p. 644.

[2] *Macdougall* v. *Bremner*, 1907, 15 S.L.T. 193; *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214; *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, per Haldane L.C. at p. 469.

Section 2.—Grounds of Illegality at Common Law.

40. A contract is illegal at common law if its objects are criminal, fraudulent, immoral, or contrary to public policy. In the broad sense, of course, a contract, the object of which is the commission of a crime or of an act which flagrantly violates the accepted canons of morality, is contrary to public policy. But in this particular connection it is usual to separate those contracts whose unlawful nature depends upon their being at variance with morality from a somewhat indeterminate class in which the Courts have based a refusal to enforce the contract on its supposed conflict with accepted views on social and economic questions.

Subsection (1).—*Agreement to commit a Crime or to Defraud.*

41. The Courts will take no cognisance of rights said to have accrued under an agreement to commit a crime,[1] nor will they enforce an agreement to defraud.[2] An agreement for secret commission is void,[1] whether the recipient's conduct has been influenced by the bribe or not,[3] as is a contract between principal and agent to defraud a third party,[4] or a contract to "rig the market" on the Stock Exchange.[5] It is illegal for an exposer at an auction to employ a person to bid at the sale so as to increase the price fraudulently. If he does so the next highest offerer is entitled to delivery of the property sold at the bid which he made.[6] So also an intending offerer may not give money to others to induce them to abstain from bidding,[7] though in England a person about to tender for a contract may buy off potential competitors.[8] Where intending offerers agree that one of them shall purchase at the upset price and that thereafter they shall dispose of the subject of sale amongst themselves, dividing amongst themselves the difference between the upset price and that ultimately realised, the seller may recover from any of them the difference between the upset price and the sum which the property would have brought if there had been no conspiracy.[9] The white-bonneting cases arose on questions between sellers and buyers, but it follows from the fact that the defrauded seller can sue for damages that the bargains made between sellers are contracts to procure a fraud and are illegal.

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[1] *Macdougall* v. *Bremner*, 1907, 15 S.L.T. 193.

[2] *Henderson* v. *Caldwell*, 1890, 28 S.L.R. 16; *Laughland* v. *Miller Laughland & Co.*, 1904, 6 F. 413.

[3] *Harrington* v. *Victoria Graving Dock Co.*, 1878, 3 Q.B.D. 549.

[4] *Henderson* v. *Caldwell*, *supra*; *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369.

[5] *Scott* v. *Brown*, [1892] 2 Q.B. 724.

[6] *Grey* v. *Stewart*, 1753, Mor. 9560; *Anderson* v. *Stewart*, 16th December 1814, F.C.; *cf.* Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58.

[7] *Aitchison*, 1783, Mor. 9567.

[8] *Jones* v. *North*, 1875, L.R. 19 Eq. 426.

[9] *Murray* v. *Mackwhan*, 1783, Mor. 9567; but *cf.* in England *Rawlings* v. *General Trading Co.*, [1921] 1 K.B. 635.

SUBSECTION (2).—*Contracts to defeat the Bankruptcy Laws.*

42. Such contracts are unlawful, and effect will not be given to them. See BANKRUPTCY AND INSOLVENCY.[1]

SUBSECTION (3).—*Contracts for the Furtherance of Illicit Sexual Relations.*

43. A contract for the furtherance of illicit sexual relations is unlawful. Thus a bond, the consideration for which is that the woman should submit to such intercourse, or a bond granted in reward for such intercourse is illegal,[2] as is a contract to take back a divorced wife without remarrying her.[3] This holds not only of bonds and similar obligations, but also of legacies left as a recompense for such intercourse.[4] But, on the other hand, a provision made for the woman after intercourse is over may be good;[5] and mutual wills by adulterers are not open to challenge to the effect of barring innocent third parties from taking legacies thereunder.[6]

SUBSECTION (4).—*Contracts interfering with the Freedom of Marriage.*

44. The law refuses to enforce contracts which interfere with the freedom of marriage. Marriage brocage bonds are illegal.[7] A promise to marry given by a married man known to the promisee to be married cannot be the ground of action, even after the death of his wife.[8] But a condition, in an obligation by a father to pay a sum of money to his child, providing for forfeiture in the event of the child marrying without the father's consent is not struck at;[9] and a legacy may be made conditional on the legatee not marrying a specified person or not marrying a person of a defined class,[10] or the legacy may be made to determine on a second marriage by the legatee.[11]

SUBSECTION (5).—*Contracts relating to Custody of Children.*

45. It would appear that a contract providing for the perpetual surrender of custody of a child by a parent is not unlawful. Such a contract will not, however, be enforced by specific performance, although the pecuniary provisions which it may contain are enforceable.[12] A provision that a child, as a condition of receiving a legacy under a will,

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[1] Vol. II. p. 93, *ante*.
[2] *Hamilton* v. *Main*, 1823, 2 S. 356.
[3] *Graham* v. *Kennedy*, 1860, 22 D. 560.
[4] *Johnstone* v. *M'Kenzie's Exrs.*, 1835, 14 S. 106; *Hamilton* v. *De Gares*, 1765, Mor. 9471.
[5] *Webster* v. *Webster's Tr.*, 1886, 14 R. 90.
[6] *Young* v. *Johnson and Wright*, 1880, 7 R. 760.
[7] *Thomson* v. *Mackaile*, 1770, Mor. 9519; *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123.
[8] *Wilson* v. *Carnley*, [1908] 1 K.B. 729.
[9] *Hay* v. *Wood*, 1781, Mor. 2982.
[10] *Ommaney* v. *Bingham*, 1792, Mor. 2985; revd. 1796, 3 Pat. 448; *Forbes* v. *Forbes Trs.*, 1882, 9 R. 675.
[11] *Kidd* v. *Kidds*, 1863, 2 M. 227.
[12] *Macpherson* v. *Leishman*, 1887, 14 R. 780; *Kerrigan* v. *Hall*, 1901, 4 F. 10.

shall reside apart from its parents is *contra bonos mores*, and will be held *pro non scripto*.[1]

Subsection (6).—*Contracts rendered Illegal by Unlawful or Immoral Objects.*

46. Although a contract may in itself be unobjectionable, it may be found to be illegal by reason of the object for which it is entered into. Thus where a carriage was hired by a prostitute in furtherance of her occupation,[2] a house let for immoral purposes,[3] works let for a process of manufacture prohibited by statute,[4] money lent for use in playing an illegal game,[5] or funds spent in advertising a lottery,[6] the lessor, lender, or agent could not recover the stipulated consideration due to him under the contract. In such a case knowledge of the illegal object on the part of the party suing on the contract must be proved,[7] but it may be proved by parole even though the contract be in writing and make no mention of the purpose of the contract.[8] To render the contract illegal, all that is required is knowledge of the purpose; it is not necessary to bring home knowledge that the purpose was in fact unlawful.[9]

Subsection (7).—*Gaming Contracts and* Sponsiones Ludicræ.

See Gaming, Betting, and Lotteries.[10]

Subsection (8).—*Contracts contrary to Public Policy.*

(i) *In General.*

47. In a somewhat ill-defined area, contracts which are held by the Courts to be "contrary to public policy" are treated as being unlawful. It has been said that "the argument of public policy should be most cautiously applied by judges," and should hardly be applied, except to cases where there is an exact precedent,[11] but it is not easy to define the scope of grounds of challenge based on public policy with any degree of precision. In general (*a*) contracts which run contrary to the foreign policy of the state, (*b*) contracts which by their operation would tend to interfere with the domestic administration of the state, (*c*) contracts which involve an undue invasion of personal liberty, and (*d*) contracts which are in restraint of trade, are all open to challenge on the ground of their running contrary to public policy.

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[1] *Fraser* v. *Rose*, 1849, 11 D. 1466; *Grant's Trs.* v. *Grant*, 1898, 25 R. 929.
[2] *Pearce* v. *Brooks*, 1866, L.R. 1 Ex. 213. [3] *Upfill* v. *Wright*, [1911] 1 K.B. 506.
[4] *Gas Light and Coke Co.* v. *Turner*, 1840, 6 Bing. N.C. 324.
[5] *M'Kinnell* v. *Robinson*, 1838, 3 M. & W. 434.
[6] *Smith's Advertising Agency* v. *Leeds Laboratory Co.*, 1910, 26 T.L.R. 335.
[7] *Pearce* v. *Brooks*, *supra*, per Pollock C.B. at p. 217.
[8] *Gas Light and Coke Co.* v. *Turner*, *supra*, per Abinger C.B. at p. 327.
[9] *Smith's Advertising Agency* v. *Leeds Laboratory Co.*, *supra*, per Farwell L.J. at p. 337.
[10] Vol. VII. p. 424, *ante*.
[11] *Earl of Caithness* v. *Sinclair*, 1912 S.C. 79, per Lord Pres. Dunedin at p. 84.

(ii) *Contracts running contrary to the Foreign Policy of the State.*

48. As the maintenance of friendly relations with foreign powers is part of the general foreign policy of the country, a contract running contrary to this policy and interfering with the interest of a foreign government may be illegal.[1] Thus a loan for the purpose of financing a rebellion in a friendly state is illegal. But a contract to trade with a port blockaded by a friendly power is not unlawful.[2] And our Courts do not enforce the revenue laws of foreign countries.[3]

49. The principal sphere in which considerations of this description affect contracts is the effect of the declaration of war by this country on contracts with persons resident in enemy states. The result of the declaration of war is not that all contracts current at outbreak between citizens of this country and the enemy governments or persons residing in enemy states are rendered void, but that their operation is suspended until the return of peace.[4] If, however, the nature and incidents of the contract are such as to shew that the parties could not have had in contemplation such a state of suspended animation, the contracts are held to have been frustrated by the outbreak of war.[5] Once war is declared, all contracts thereafter entered into between persons in this country and enemy governments or residents in enemy states are void.[6] But to produce this result, war must in fact have been declared at the time of the contract being formed. An insurance effected in the expectation of hostilities and just before the formal declaration of war is valid.[7] The ramifications of modern commercial enterprise shewed during the recent war that it was certainly more convenient, if not absolutely necessary, that *ad hoc* legislation should be passed to deal with the various questions, civil and criminal, that arise during a period of protracted hostilities between countries normally in full commercial intercourse with one another. The "War Cases" are decisions on the exact import of various statutes,[8] and apart from their general recognition of the principle of this paragraph, have no bearing on the law of contract. The bar to commercial intercourse may be removed by licence from the Crown.[4]

(iii) *Contracts involving Interference with Elections.*

50. Contracts to procure corruption at elections are void both by statute and at common law. So a bond for a vote,[9] an action of accounting

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[1] *De Wutz* v. *Hendricks*, 1824, 2 Bing. 314.
[2] *The "Helen,"* 1865, L.R. 1 A. & E. 1.
[3] *Stewart* v. *Gelot*, 1871, 9 M. 1057, per Lord Justice-Clerk Moncreiff at p. 1062.
[4] Bell's Prin., s. 43.
[5] *Esposito* v. *Bowden*, 1857, 7 E. & B. 763; *Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum Products Co.*, [1916] 2 A.C. 397.
[6] Bell's Prin., *supra*; *Janson* v. *Driefontein Mines*, [1902] A.C. 484.
[7] *Janson* v. *Driefontein Mines*, *supra*.
[8] Cf. *H.M. Advocate* v. *Innes*, 1915 S.C. (J.) 40; 7 Adam 596; *H.M. Advocate* v. *Hetherington*, 1915 S.C. (J.) 79; 7 Adam 663.
[9] *Glen* v. *Dundas*, 1822, 1 S. 256.

for money received for the purpose of giving bribes,[1] or an agreement to procure the abandonment of an election petition,[2] are all unenforceable. An agreement by an elected person to vote in agreement with the majority of the body of which he is a member,[3] is unlawful. On the other hand, it is quite legal to buy off opposition to a private bill.[4] A bequest conditional on the recipients obtaining an advance in the peerage is void,[5] but a clause of devolution in an entail is good.[6] See FRANCHISE AND ELECTION LAW.[7]

(iv) *Contracts interfering with the Administration of Justice.*

51. Such contracts are void. Thus a bond granted as consideration for obtaining a pardon cannot be enforced;[8] nor can a contract between a law agent and a messenger-at-arms providing for a division of the messenger's fees.[9] A contract which provides for one party bringing a bogus action of damages for advertisement purposes is not enforceable.[10] It is apparently the law in England that an agreement to forbear from or to withdraw criminal proceedings is unenforceable.[11] The legality of such an agreement in Scotland has been considered twice in the Courts, but in neither case was it necessary to decide whether such a contract was unlawful.[12] In one case, however, in the Outer House, it has been held that such a bargain was unenforceable, even if the situation was that while all parties to the contract believed that the facts shewed a crime to have been committed, there was in fact no criminal offence.[13]

(v) *Contracts affecting the Proper Exercise of a Public Function.*

52. A bargain for a bribe to be paid for the exercise of patronage is unenforceable,[14] as is an agreement to exercise influence to the obtaining of a benefit from the Government.[15] So also is an agreement to pay an annuity to a rival candidate, who in respect thereof withdraws,[16] or to resign an office held *ad vitam aut culpam* if called upon to do so,[17] or to get a deputy to do the whole work of a public office for the performance

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[1] *Campbell* v. *Scotland*, 1778, Mor. 9530.
[2] *Coppock* v. *Bower*, 1838, 4 M. & W. 361.
[3] *Hoggan* v. *Wardlaw*, 1735, 1 Pat. 148; *Paterson* v. *Mags. of Stirling*, 1775, Mor. 9527.
[4] *Simpson* v. *Lord Howden*, 1842, 9 Cl. & Fin. 61.
[5] *Egerton* v. *Earl Brownlow*, 1853, 4 H.L.C. 1.
[6] *Earl of Caithness* v. *Sinclair*, 1912 S.C. 79.
[7] Vol. VII. p. 188, *ante*.
[8] *Stewart* v. *Earl of Galloway*, 1752, Mor. 9465.
[9] *Henderson* v. *Mackay*, 1833, 11 S. 225; *Ord* v. *Hill & Paul*, 1847, 9 D. 1118.
[10] *Dann* v. *Curzon*, 1910, 27 T.L.R. 163.
[11] Leake on Contracts, 7th ed., p. 536.
[12] *The Lamson Paragon Supply Co., Ltd.* v. *Macphail*, 1914 S.C. 73; *Ferrier* v. *Mackenzie*, 1899, 1 F. 597.
[13] *Smith & Sons* v. *Buchanan* (O.H.), 1910, 2 S.L.T. 387.
[14] *Stewart* v. *Miller*, 1802, 4 Pat. 286, per Eldon L.C. at pp. 290–91.
[15] *Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K.B. 241.
[16] *Thomson* v. *Dove*, 16th February 1811, F.C.
[17] *Adam* v. *Directors of Inverness Academy* (1815), 1835, 14 S. 714 n.; *Simpson* v. *Tod*, 1824, 3 S. 150.

of which the public is entitled to the services of both principal and deputy.[1] It has been said that there is no absolute rule that the right to an office is not capable of being transferred by disposition,[2] but profit-sharing is illegal even if the presentation is saleable.[3] Simoniacal contracts are illegal.[4] And a bargain by a parish minister not to raise an augmentation,[5] or, as the price of consent to one augmentation not to raise a second, cannot be enforced.[6] A contract by a newspaper to abstain from comment as to transactions in regard to which it professes to give expert information is unlawful.[7]

(vi) Pactum de quota litis.

53. An agreement by a law agent to render his professional services on the terms that he shall receive as his remuneration a share in the property which is the subject of litigation is void at common law.[8] There is a statutory prohibition on members of the College of Justice purchasing heritage which is the subject of a depending suit.[9] But the objection is only open against a law agent or a member of the College of Justice, and an outside party may finance a litigation on an agreement to share in the funds recovered.[10]

(vii) *Contracts in Restraint of Trade.*

See Restraint of Trade.

(viii) *Contracts relating to Sale of Government Permits issued during War.*

54. During the recent war the necessities of the situation led to various general prohibitions being imposed on domestic trade, which involved the issue of permits or licences from Government Departments before certain ordinary trading transactions could be carried through. It was held both in Scotland and in England that a permit to take a specified quantity of wines or spirits out of bond could not be transferred, and that the contract for the sale of such a permit was illegal in respect that it formed an endeavour to evade the policy of the legislation in requiring such permits, which was designed to equalise supplies as between consumers.[11]

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[1] *Mason* v. *Wilson*, 1844, 7 D. 160.

[2] *Earl of Lauderdale* v. *Wedderburn*, 1908 S.C. 1237, per Lord Pres. Kinross at p. 1257; revd. 1910 S.C. (H.L.) 35; *cf.* Lord Shaw at p. 46.

[3] *Gardner* v. *Grant*, 1835, 13 S. 664.

[4] *Maxwell* v. *Earl of Galloway*, 1775, Mor. 9580; *Steven* v. *Lyell*, 1759, Mor. 9578.

[5] *Boyd* v. *Earl of Galloway*, 1794, Mor. 9583.

[6] *Earl of Kellie* v. *Brodie*, 1803, Mor. 15710.

[7] *Neville* v. *Dominion of Canada News Co.*, [1915] 3 K.B. 556.

[8] Bell's Prin., s. 36 (2); *Johnston* v. *Rome*, 1831, 9 S. 364. [9] See para. 57, *infra*.

[10] *Rucker* v. *Fischer*, 1826, 4 S. 438; *Waddel* v. *Hope*, 1843, 6 D. 160.

[11] *Trevalion & Co.* v. *Blanche & Co.*, 1919 S.C. 617; *Sykes* v. *Bridges, Routh & Co.*, 1919, 35 T.L.R. 464.

Section 3.—Illegality arising as a Result of the Operation of Statute.

Subsection (1).—*In General.*

55. There are many statutes which by their operation limit freedom of contract. The effect to be given to them is in each case dependent on the construction of the particular Act. And in this sphere analogy is sparingly applied. A strict classification is not possible in view of the number of statutes involved and the varying terms in which they are conceived, but the subject may be dealt with by treating separately (1) statutes which forbid a particular contract or way of contracting, (2) statutes which annex a penalty to a particular contract or way of contracting, and (3) statutes which without making any express provision forbidding a contract or annexing a penalty render certain contracts unenforceable. The effects of the illegality vary in correspondence with the classification under which it falls.[1]

Subsection (2).—*Contracts prohibited by Statute.*

56. A definite contract or method of contracting may be directly forbidden by statute. Such a contract cannot be enforced in Court. But if the forbidden act is lawful at common law, and if there can be no case of *turpis causa* made out, the effects of the illegality do not extend past the actual contract. The Courts will intervene to prevent one party getting an advantage at the other's expense. For instance, where a sale is carried through under illegal weights, while the actual contract of sale cannot be enforced, if it is in fact executed to the extent of delivery of the goods sold, the buyer is liable to the seller for the market value of the goods.[2] And though a contract of life insurance is void where there is no insurable interest, if the company pay the sum due under the policy, the Courts will decide to whom the funds belong.[3]

Subsection (3).—*Contracts on which a Statute imposes a Penalty.*

57. A statute may impose a penalty on a particular contract without declaring the penalised act illegal. In such a case it is a matter of construction as to whether any, and if so what, consequences further than the penalty are involved. The sole purpose of the penalty may have been to secure revenue, in which case contracts which have incurred the penalty are not further affected. For instance, a tobacco dealer who had not taken out the necessary Excise Licence was held entitled to recover the price of tobacco sold,[4] and failure to comply with the provisions of the revenue statutes regarding stamp duties

[1] *Whiteman* v. *Sadler*, [1910] A.C. 514, per Lord Dunedin at pp. 525–527.
[2] *Cuthbertson* v. *Lowes*, 1870, 8 M. 1073.
[3] *Hadden* v. *Bryden*, 1899, 1 F. 710.
[4] *Smith* v. *Mawhood*, 1845, 14 M. & W. 452.

may not void the contract.[1] But smuggling contracts, though they only affect the revenue laws, are absolutely void. Where the object of the penalty in the statute is to protect the public, the penalty will in general involve the result that a contract incurring the penalty is unenforceable.[2] But this rule is not absolute. The penalty may be sufficient deterrent in itself without affecting the contract; [3] or it may be personal to the party infringing, as, *e.g.*, deprivation of office in the case of a member of the College of Justice who purchases heritage which is the subject of a depending suit.[4]

Subsection (4).—*Contracts declared to be Unenforceable.*

58. In certain cases a particular contract may be declared to be unenforceable, though not rendered subject to a penalty and not declared to be illegal. The most striking example is the case of contracts between Trades Unions and their members as regulated by s. 4 of the Trade Union Act of 1871.[5] Such contracts are not unlawful, but cannot be enforced in Court. See Trade Union. On the other hand, in construing the Tippling Act, 1750,[6] where the statutory bar consists merely in the prohibition of actions for the recovery of certain debts, the Courts in Scotland have held that not only can no action lie for debts struck at by the Act, but that no consequences to which the Court will give effect can flow from bargains or dealings which contravene it. Thus a bill granted for supplies which are forbidden by the Act cannot be enforced; [7] indefinite payments cannot be ascribed to prohibited transactions; [7] nor can entries in regard to such transactions be used to elide the triennial prescription.[8]

Section 4.—Particular Cases of Contracts where the Operation of Statute may involve Illegality.

Subsection (1).—*Statutory Regulation of Trades and Professions.*

59. In a large and increasing number of cases conditions are imposed by statute on the carrying on of certain professions and trades. As these statutes are conceived for the protection of the public the general presumption is that the mere imposition of a penalty is evidence that the contract is illegal to the fullest effect.[9] Where the Act declares

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[1] *Learoyd* v. *Bracken*, [1894] 1 Q.B. 114. (This case does not now express the law. See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 53, and Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 7 (1).)

[2] *Cope* v. *Rowlands*, 1836, 2 M. & W. 149 (brokers); *Cundell* v. *Dawson*, 1847, 4 C.B. 376 (selling coal); *Gordon* v. *Howden*, 1845, 4 Bell's App. 254 (pawnbrokers; but see Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 51); *Meliss* v. *Shirley Local Board*, 1885, 16 Q.B.D. 446; *Fullarton* v. *Scot*, 1743, Mor. 9586.

[3] *Whiteman* v. *Sadler*, [1910] A.C. 514, per Lord Dunedin at p. 527, and Lord Mersey at p. 534.

[4] *Home* v. *Earl of Home*, 1713, Mor. 9502; cf. *Blaikie* v. *Aberdeen Rly. Co.*, 1851, 14 D. 66 (revd. on another point, 1854, 1 Macq. 461).

[5] 34 & 35 Vict. c. 31. [6] 24 Geo. II. c. 40. [7] *Maitland* v. *Rattray*, 1848, 11 D. 71.

[8] *Macpherson* v. *Jamieson*, 1901, 4 F. 218. [9] See para. 57, *supra*.

in imperative terms that certain qualifications are necessary or that certain conditions must be complied with, a contract entered into by a person lacking the statutory qualifications or without compliance with the prescribed conditions is void, and where the language is imperative there is no room for speculation as to intention.[1] The decisions principally illustrate the case of solicitor and client. Persons practising as law agents in Scotland are required by statute to take out a licence.[2] An unlicensed practitioner cannot sue for his account for professional services, nor can he get decree in his name as the agent disburser. But once decree has passed in his name, his lack of licence is no ground for suspending the decree.[3] And if he agrees to a composition in bankruptcy this cannot be challenged.[4] Not only can the agent not sue, but the relationship of agent and client produces no legal consequences. The client cannot recover expenses against his adversary in a litigation,[5] and there can be no room for an accounting between a licensed and unlicensed practitioner carrying on business as partners.[6]

60. There are many other cases, such as doctors,[7] dentists,[8] patent agents, etc. and the same principles apply to such cases. There are also special Acts dealing with moneylenders, pawnbrokers,[9] and other traders. See MONEY AND MONEYLENDERS: PAWNBROKING.

SUBSECTION (2).—*The Truck Acts.*

61. The relation of master and servant is dealt with by a series of enactments known as the Truck Acts.[10] By these it is illegal to enter into a contract of service where the method of spending the servants wages is prescribed by the bargain. Certain deductions are allowed, *e.g.* rent and medicine, provided there is an agreement in writing to that effect which must be *de futuro*.[11] The employer's interest in the shop prescribed as the *locus* of the spending is of no consequence.[12] All deductions except those expressly authorised are forbidden,[13] so there can be no deduction for failure to quit a house,[14] or for damages where these have been recovered against the servant by the employer.[15]

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[1] *Cope* v. *Rowlands*, 1836, 2 M. & W. 149; *Mellis* v. *Shirley Local Board*, 1885, 16 Q.B.D. 446; *Whiteman* v. *Sadler*, [1910] A.C. 514.

[2] Stamp Act, 1891 (54 & 55 Vict. c. 31), s. 43; Law Agents and Notaries Public (Scotland) Act, 1891 (54 & 55 Vict. c. 30), s. 3.

[3] *Ewing* v. *Wallace*, 1832, 6 W. & S. 222.

[4] *Gemmell's Exrs.* v. *Moon*, 1838, 16 S. 505, at p. 508.

[5] *Innes* v. *Macdonald*, 1899, 2 F. 6.

[6] *A. B.* v. *C. D.*, 1912, 1 S.L.T. 44.

[7] Medical Act, 1886 (49 & 50 Vict. c. 48).

[8] Dentists Act, 1923 (13 & 14 Geo. V. c. 36).

[9] Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

[10] Truck Act, 1831 (1 & 2 Will. IV. c. 37); 1887 (50 & 51 Vict. c. 46); 1896 (59 & 60 Vict. c. 44).

[11] *Hynd* v. *Spowart & Co.*, 1884, 22 S.L.R. 702.

[12] *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297.

[13] *Summerlee Iron Co.* v. *Thomson*, 1913 S.C. (J.) 34; 7 Adam 60.

[14] *M'Farlane* v. *Birrell*, 1888, 16 R. (J.) 28; 2 White 126.

[15] *Williams* v. *North's Navigation Collieries*, [1906] A.C. 136.

Subsection (3).—*Contracts of Insurance.*

62. By statute an insurance policy, whether marine [1] or life,[2] is illegal unless the insurer has an insurable interest in the subject-matter of the policy. Apparently this also applies to fire,[3] but it would not seem to apply to contracts analogous to insurance.[4] It is *pars judicis* to take the exception.[5] The insurer, even though innocent or ignorant, cannot recover on the policy,[6] and cannot even obtain repetition of the premiums paid, unless his belief that he had an insurable interest was caused by the fraudulent misrepresentations of the insurance company's agent.[7] The illegality is confined to the policy and actions on it. If the company pay on the policy, the Courts will decide how the money falls to be distributed.[8] In the case of life policies, it is sufficient if the insured had an interest at the time the policy was effected.[9] Thus a person may effect a policy on his own life and assign it,[10] unless the policy has been taken out in such a way as to be an evasion of the Act.[11] Mere relationship does not confer an interest. There is an interest in the case of husband and wife,[12] but not in the case of parent and child,[13] unless under the terms of the Friendly Societies Act, 1896.[14] Contractual relations which give the assured an interest in the life of the person over whose life the policy is effected are sufficient compliance with the Act. Thus the relationship of master and servant,[15] employer and agent,[16] creditor and debtor [17] have all been held to confer the needful interest.

Section 5.—Effect of the Illegality of a Contract.

63. The general principle may be summarised in the maxims, *ex turpi causa non oritur actio* and *in turpi causa melior est conditio possidentis*, or, from another point of view, a person *allegans suam turpitudinem non est audiendus*.[18] No person may sue for implement of an unlawful contract or for enforcement of an incidental right arising under it. But the party resisting implement is fully entitled to found

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[1] Marine Insurance Act, 1906 (6 Edw. VII. c. 41); Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. VII. c. 10).

[2] 14 Geo. III. c. 48.

[3] Bell, Com. i. 672.

[4] *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256 [argument at p. 258].

[5] *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214, per Kennedy J. at p. 220.

[6] *Harse* v. *Pearl Life Co.*, [1904] 1 K.B. 558.

[7] *British Workmen's Co.* v. *Cunliffe*, 1902, 18 T.L.R. 502; *Hughes* v. *Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482.

[8] *Hadden* v. *Bryden*, 1899, 1 F. 710.

[9] *Dalby* v. *India and London Assurance Co.*, 1854, 15 C.B. 365.

[10] Bell's Prin., s. 520.

[11] *Macdonald* v. *National, etc. Association of Australasia*, 1906, 14 S.L.T. 173.

[12] *Wight* v. *Brown*, 1849, 11 D. 459.

[13] *Harse* v. *Pearl Life Co.*, *supra*; *Hadden* v. *Bryden*, *supra*.

[14] Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 62–67.

[15] *Hebdon* v. *West*, 1863, 3 B. & S. 579.

[16] *Turnbull* v. *Scottish Provident Institution*, 1896, 34 S.L.R. 146.

[17] *Stevenson* v. *Cotton*, 1846, 8 D. 872.

[18] *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123, per Collins M.R. at p. 131.

on the illegality,[1] and although he may have made a gain on the transaction he will not be made to account for it, even though he may have made his profit by a fraud against his partner in the illegal act.[2] There may be a possible exception where a legal partnership is carried on in an illegal way. In such a case there may be accounting between partners,[3] but there can be no accounting between conspirators in a scheme for fraud.[4] A lease granted for an immoral consideration cannot be reduced by the granter or his heirs,[5] and there can be no action for indemnity or relief founded on an unlawful bargain.[6] What in one sense is an exception to the general rule is the case already dealt with, of a bargain lawful at common law which is declared to be illegal by statute where there is no question of there being a *turpis causa*.[7] In such a case, while the actual bargain is unenforceable, the incidental rights of the parties may be protected. So also where a statute adjects a penalty to a certain act, that penalty may be the sole result and the bargain may be completely enforceable,[8] but in these circumstances though there is a penalty the contract is not in the true sense unlawful.

64. There is a much wider and far-reaching class of exceptions where the parties are not held to be *in pari delicto*. If one of the parties to an unlawful contract was in a position to concuss the other into the illegal act, this latter may plead the illegality and be restored against the consequences of the contract.[9] So where a debtor has been compelled by a creditor to grant a secret preference as the price of his accession to a composition contract, the debtor may recover the sums so paid, though in doing so he is founding on the illegality of his own act.[10] This principle has been applied to cases arising out of peculiar commercial conditions existing during the war. Where a wholesaler was said to have concussed a retailer, by taking advantage of the latter's financial and commercial necessities, into a contract which ran counter to a price control order, it was held that the retailer's concurrence in the illegal act was not necessarily a bar to his suing for repetition of the excess price.[11] If a statute be passed to protect a class to the effect of making certain contracts illegal, the illegality of the contract is no bar to a member of the protected class seeking restoration against the unlawful contract to which he was a party.[12]

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[1] *Scott* v. *Brown*, [1892] 2 Q.B. 724.

[2] *Fraser* v. *Hill*, 1852, 14 D. 335; *A. B.* v. *C. D.*, 1912, 1 S.L.T. 44.

[3] *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496.

[4] *Laughland* v. *Miller Laughland & Co.*, 1904, 6 F. 413.

[5] *A.* v. *B.*, 21st May 1816, F.C.; revd. on another ground, *Duke of Hamilton* v. *Waring*, 1820, 6 Pat. 644.

[6] *Shackell* v. *Rosier*, 1836, 2 Bing. N.C. 634; *Smith & Son* v. *Clinton*, 1908, 25 T.L.R. 34; *Stewart* v. *Gibson*, 1846, 1 Rob. 260.

[7] See para. 56, *supra*.

[8] See para. 57, *supra*.

[9] *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K.B. 558, per Collins M.R. at p. 563; *Reynell* v. *Sprye*, 1852, 1 De G. M. & G. 660.

[10] *Arrol* v. *Montgomery*, 1826, 4 S. 499; *Macfarlane* v. *Nicoll*, 1864, 3 M. 237.

[11] *M'Carroll* v. *Maguire*, 1920, 2 S.L.T. 220.

[12] *Phillips* v. *Blackhurst*, 1912, 2 S.L.T. 254.

65. Where parties have acted under an illegal contract, neither of them may plead the illegality so as to secure benefits from actings outwith the contract. Thus a solicitor who had entered in a *pactum de quota litis* may not plead the illegality of this contract for remuneration, so to entitle him to sue for remuneration in the ordinary way where the original bargain would have left him entitled to nothing.[1] There is English authority that where money is paid for an unlawful purpose it may be recovered if demanded back before the unlawful purpose is carried out,[2] but that if there be part implement there can be no recovery.[3]

66. A contract may be divisible so that although part is unlawful the remainder is lawful.[4] Accordingly an illegal renunciation of a tenant's right did not invalidate the lease,[5] and an agreement about wages contravening the Coal Mines Regulation Act did not affect a term in the contract regarding notice of termination.[6]

67. Although a party to an illegal contract is in general barred from vindicating his rights in Court, he may invoke the aid of the law to give him his redress against some of the indirect consequences. Thus where a lease is entered into for unlawful objects, while the lessor cannot sue for rent or reduce the contract, he may at its termination recover possession of his own property.[7]

68. Subject to certain statutory exceptions,[8] the general rule is that *assignatus utitur jure auctoris*;[9] and in the case of a bill the indorsee who has notice that the bill has been granted for an illegal consideration cannot enforce it.[10]

Section 6.—Unlawful Contracts and International Law.

69. If a contract made abroad is lawful in the country where made, but unlawful in Scotland, the Scots Courts will not enforce implement in Scotland, as, *e.g.*, payment for the price of smuggled goods where the contract has been made abroad.[11] If, on the other hand, implement is to be made either wholly or partly in the place where the contract was made, the law cannot be stated with any certainty. Thus certain

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[1] *Bolden* v. *Fogo*, 1850, 12 D. 798.

[2] Pollock on Contract, 9th ed., p. 463; *Diggle* v. *Higgs*, 1877, 2 Ex. D. 422; *Trimble* v. *Hill*, 1879, 5 App. Cas. 342; *Burge* v. *Ashely & Smith, Ltd.*, [1900] 1 Q.B. 744; *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123.

[3] *Herman* v. *Jeuchner*, 1885, 15 Q.B.D. 561; *Kearley* v. *Thomson*, 1890, 24 Q.B.D. 742.

[4] *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q.B. 700; *Lord Lovat* v. *Fraser*, 1745, Mor. 9557; *Farmers' Mart* v. *Milne*, 1914 S.C. (H.L.) 84, per Lord Dunedin at p. 87.

[5] *Stanton* v. *Brown*, [1900] 1 Q.B. 671. [6] *Kearney* v. *Whitehaven Colliery Co.*, *supra*.

[7] *Taylor* v. *Bowers*, 1876, 1 Q.B.D. 291, per James L.J. 298; *Gordon* v. *Chief Commr. of Police*, 1910, 26 T.L.R. 645.

[8] Moneylenders Act, 1911 (1 & 2 Geo. V. c. 38); Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 30 and 38.

[9] *Nisbet's Crs.* v. *Robertson*, 1791, Mor. 9554.

[10] *Duncan* v. *Thomson*, 1776, Mor. App. "*Pactum Illicitum*," 1.

[11] *Cantley* v. *Robertson*, 1790, Mor. 9550; *Cullen & Co.* v. *Philp*, 1793, Mor. 9554; *Reid & Parkinson* v. *Macdonald*, 1795, Mor. 9555.

contracts said to be unlawful by English law have been refused enforcement in England as inferring such a degree of immorality as to compel the Courts to disregard them.[1] On the other hand, a gaming debt incurred in a country where such a debt is enforceable,[2] and even a contract for the sale of slaves made in Brazil at a time when slavery was recognised there, have both been enforced.[3]

70. The converse case of a contract admittedly lawful in Scotland, but said to be unlawful in the country where made, has not been the subject of decision. Opinions have been expressed that such a contract would not be enforced in Scotland,[4] but there is very high authority for the proposition that a contract which is unlawful abroad only by reason of its coming into conflict with the revenue laws of the country where it is made will be enforced by our Courts.[5]

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[1] *Hope* v. *Hope*, 1857, 8 De G. M. & G. 731 (collusive divorce); *Kaufman* v. *Gerson*, [1904] 1 K.B. 591 (contract obtained by threats).

[2] *Saxby* v. *Fulton*, [1909] 2 K.B. 208.

[3] *Santos* v. *Illidge*, 1860, 8 C.B. N.S. 861; cf. *Hamlyn* v. *Talisker Distillery*, 1894, 21 R. (H.L.) 21.

[4] *Clements* v. *Macaulay*, 1866, 4 M. 583; *Valery* v. *Scott*, 1876, 3 R. 965.

[5] *Stewart* v. *Gelot*, 1871, 9 M. 1057; *Attorney-General for Canada* v. *Schulze*, 1901, 9 S.L.T. 4.

ILLEGAL DRILLING.

See ARMED FORCES OF THE CROWN.

ILLEGAL PRACTICES AT ELECTIONS.

See FRANCHISE.

ILLEGITIMACY.
ILLEGITIMATE.

See AFFILIATION; ALIMENT; CROWN; CUSTODY OF CHILDREN; LEGITIMATION.

IMBECILE.

See INSANITY AND LUNACY.

IMMIGRATION.

See ALIENS.

IMMORAL TRAFFIC.

See CRIME.

IMPEACHMENT.

See PARLIAMENT.

IMPIGNORATION.

See PLEDGE.

IMPOSITION.

See CRIME.

IMPOSSIBILITY.

See CONTRACT.

IMPOTENCY.

See MARRIAGE.

IMPRESSMENT OF CARRIAGES.

See ARMED FORCES OF THE CROWN.

IMPRISONMENT.

See CRIME (PUNISHMENT); IMPRISONMENT FOR DEBT.

IMPRISONMENT FOR DEBT.

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Section 1.—Introduction.

71. The abolition of imprisonment for civil debt in all ordinary cases has made this subject largely one of historical interest to the modern practitioner. Under the early common law the power of imprisonment was a special remedy confined to merchants and to the case of obligations *ad facta præstanda*. It was first introduced as a general remedy through the influence of the clergy, being established to enforce the decrees of the Ecclesiastical Courts as the punishment of disobedience and of rebellion against God and the Church. After the Reformation the remedy of imprisonment for debt was adopted by the Civil Courts. Imprisonment proceeded upon a warrant of horning which authorised a charge for payment, and, on failure, the denunciation of the debtor as a rebel. Not only was the debtor liable to imprisonment on the King's warrant of caption, but his moveable goods were forfeited to the Crown, and were ordered to be thenceforth "inventoried and inbrought to the King's use." These consequences of insolvency became the common mode of execution for the most trifling debts, the gift of escheat being burdened with payment of the debt for which the denunciation proceeded.[1]

72. The casualty of escheat incurred by horning and denunciation for civil causes continued in force until 1747, when it was abolished.[2] Execution by imprisonment, however, continued a competent form of diligence for civil debt until the passing of the Debtors (Scotland) Act, 1880,[3] which abolished imprisonment for civil debt in all ordinary cases.

Section 2.—Imprisonment Prior to 1880.

Subsection (1).—*Procedure by Horning and Caption.*

73. Imprisonment by caption could originally only proceed on a decree or warrant from the Court of Session, either a decree in an action,

[1] Bell, Com. ii. 434. [2] 20 Geo. II. c. 50. [3] 43 & 44 Vict. c. 34.

or a decree by registration, or a decree in supplement of the judgment of an inferior Court, or, in revenue cases, on a writ of extent or fiat of Exchequer. In 1838[1] it was made competent to imprison upon an extract decree of a Sheriff. The older procedure was as follows: Upon the warrants above mentioned letters of horning under the Signet were issued, upon which the debtor was charged to pay.[2] Upon expiry of the charge without payment the debtor was denounced as a rebel (or "put to the horn"), this being done within year and day of the charge. The horning with the messenger's execution of the charge and of the denunciation were then registered in the register of hornings, and the horning as returned with the docquet of registration upon it was the ground of a new application to the Court of Session for letters of caption.

Subsection (2).—*Act of Warding.*

74. From a very ancient date the magistrates of a royal burgh were in use to issue decrees or warrants authorising the imprisonment of an inhabitant of the burgh for civil debt.[3] The privilege was confined to royal burghs, and the warrants could be issued only against inhabitants of the burgh who were subject to the jurisdiction of the magistrates, which all persons are who have resided for forty days within the royalty.[4] In form, diligence against the person was authorised by this procedure only as a second step of execution, the fiction (probably a reality at first) being that the town officer has already reported that he has made search for moveables belonging to the debtor in order to poind them, but has failed to find any such. The act of warding was superseded though not abrogated by the simpler form introduced by the Personal Diligence Act, and since the restriction of imprisonment for civil debt by the Acts of 1880 and 1882 this diligence is unknown in practice.

Subsection (3).—*The Personal Diligence Act*, 1838.

75. A new and simpler procedure was introduced by the Personal Diligence Act, 1838,[5] and was thereafter usually adopted. It was enacted that an extract decree should contain a warrant to charge the debtor to pay under pain, *inter alia*, of imprisonment, that it should be lawful by virtue of such extract to charge the debtor, and that after the expiration of the days of charge it should be competent within year and day to register the execution of charge in the register of hornings, which registration should have the same effect as if the debtor had been denounced rebel and the letters of horning had been registered conform to the older practice. On the execution being recorded, the keeper of the register writes on the extract and on the execution (if

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[1] 1 & 2 Vict. c. 114, s. 9.
[2] Juridical Styles, iii. 343 *et seq.*
[3] Stair, iv. 47, 1; Bell, Com. ii. 431; Bell, Com. i. 518.
[4] Ross, Lect. i. 255.
[5] 1 & 2 Vict. c. 114.

written on paper apart) a certificate of registration, and a warrant to imprison may then be obtained by a writer to the signet (or, in the case of a Sheriff Court decree, the creditor, or a procurator of Court) indorsing and subscribing on the extract a minute. Upon the Bill Chamber clerk (or, in the Sheriff Court, the sheriff-clerk) being presented with the extract execution, certificate of registration, and indorsed minute, he writes on the extract a deliverance, "*fiat ut petitur*"; and it is lawful, in virtue of said extract and deliverance, to search for, apprehend, and imprison the debtor in like manner as if letters of caption had been issued under the Signet.[1]

SUBSECTION (4).—*Mode of Apprehension.*

76. In order to the legal apprehension of the debtor it is necessary (1) that the messenger have his blazon displayed; (2) that he exhibit to the debtor the warrant of incarceration; and (3) that he touch the debtor with his wand of peace. It is only by the observance of these formalities, or by actual incarceration, that the debtor is legally made prisoner.[2]

SUBSECTION (5).—Cessio bonorum.

77. The process of *cessio bonorum* was at an early period introduced into this country to mitigate the severity of the law of imprisonment for debt. Under the law of cessio as ultimately developed, a debtor who had been for a month in prison for a civil debt might, under certain conditions, obtain liberation on executing, in favour of his creditors, a disposition *omnium bonorum*, whereby he surrendered to them all his funds and estate in order to payment of their debts.

SUBSECTION (6).—*Act of Grace.*

78. Persons imprisoned for debt were required, if able, to maintain themselves while in custody. By the Act of 1696, c. 32, commonly known as the "Act of Grace," it was provided that an incarcerating creditor should be bound to aliment his debtor if the latter were unable to do so himself, and that, failing his making provision for such aliment as required by the Act within ten days after being ordered to do so, the debtor should be liberated. Although intended primarily for the relief of royal burghs, the Act operated so as to mitigate the law of imprisonment for debt. It was amended and improved by a statute in 1825,[3] which provided that it should not be lawful for the keeper of any prison to receive or confine a prisoner for civil debt unless ten shillings were deposited by the creditor as a means of aliment.[4] In the event of aliment being subsequently awarded under the Act of Grace the debtor was entitled to claim it out of the deposit at the rate allowed from the date of incarceration. The rate was subsequently fixed by statute at

[1] 1 & 2 Vict. c. 114, ss. 1, 3, 5, 6, 9, 10, 11.
[2] Bell, Com. ii. 436.
[3] 6 Geo. IV. c. 62.
[4] *Ibid.*, s. 1.

one shilling per day.[1] Every prisoner claiming the benefit was bound, when desired, to execute a disposition *omnium bonorum* for behoof of all his creditors; and if he refused, when required in writing, he was not entitled to aliment so long as he persisted in his refusal.[2] By the Act of Grace a minimum rate of three shillings Scots was fixed, the amount to be awarded being entirely in the discretion of the Court, subject, as was finally decided, to the review of the Court of Session.[3] The Act provided, in general terms, that any person imprisoned for "a civil debt or cause" might claim the benefit.

79. There was formerly much controversy and conflict of decision whether a prisoner could be awarded aliment where the debt arose *ex delicto*. But it was finally settled that the Act applied in all cases where the imprisonment was at the instance of a private party for a debt civil in its nature, whether arising *ex delicto*, or *ex contractu*.[4] Aliment was awarded where the debtor was imprisoned on a *meditatione fugæ* warrant[5] and where he was imprisoned by the Crown for the non-payment of a tax,[6] but not where the imprisonment was for fines and penalties due to the Crown[7] or for non-fulfilment of *ad factum præstandum* obligations within the debtor's power.[8]

Subsection (7).—Meditatio Fugæ *Warrant.*

80. When a creditor had just ground to suspect his debtor of being about to abscond or *in meditatione fugæ*, he was entitled to obtain a warrant for the detention in this country of that debtor. The proceedings under a "*fugæ* warrant" are not criminal in character, but are a part of the machinery of imprisonment as a creditor's diligence in civil debts. The object of the warrant is to secure "the presentment of the debtor in order to enable his creditor to have *parata executio* for his debt, and thereby secure execution of ultimate diligence against his person."[9] As a remedy competent to creditors generally, it seems to have been adopted about the middle of the seventeenth century.[10] It is still competent in the limited class of cases to which imprisonment for debt continues to apply.[11]

81. The application for a *fugæ* warrant is necessarily of a summary nature. No notice of the application is given to the debtor. The warrant may be issued by any civil judge or magistrate, but where the debtor is outwith the jurisdiction of the magistrate who granted the

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[1] 45 & 46 Vict. c. 42, s. 8.
[2] 6 Geo. IV. c. 62, s. 7; *Johnstone* v. *Peddie*, 1836, 14 S. 380.
[3] *Glaswell* v. *Durham*, 1710, Mor. 7460.
[4] *Douglas*, 1794, Mor. 11795; Bell, Com. ii. 445–446.
[5] *Smith* v. *Christie*, 1776, Mor. 11816.
[6] *The Crown* v. *Mags. of Inverness*, 1856, 18 D. 366.
[7] *Stewart* v. *Leslie*, 1783, Mor. 11817.
[8] *Turner* v. *Ross*, 1709, Mor. 11802; *Brechin* v. *Taylor*, 1842, 4 D. 909; Ersk., iv. 3, 28.
[9] *Marshall* v. *Dobson*, 1844, 7 D. 232.
[10] M'Kenzie's Observations; Bell, Com. ii. 449; *Crs. of Mason*, 1665, Mor. 8547.
[11] See para. 94, *infra*.

warrant, it must be endorsed by a magistrate of the jurisdiction within which the debtor is to be apprehended. A Sheriff's warrant, however, does not require such endorsation.[1] The application is by petition in which the creditor sets forth his debt and the grounds of his belief that the debtor means to leave the country, and craves that his oath may be taken as to the truth of his averments, and that thereon the debtor may be apprehended and brought up for examination and thereafter committed to prison until he find caution *de judicio sisti*. The creditor's oath must set forth some special ground for his belief as to the debtor's *meditatio fugæ*, a general oath of credulity not being enough.[2]

82. On the warrant being granted the debtor is at once apprehended and brought before the judge, who, after inquiry, either (1) liberates him if not satisfied of the existence of *meditatio fugæ*, or (2) authorises his imprisonment until he finds caution for his appearance in an action to be raised against him within a certain time (usually six months); or, if there be diligence against him, to abide the course of it. It is not enough to justify a warrant that the debtor is going to another part of Scotland, however remote; [3] nor that he intends to retire to the sanctuary, since this is a privilege permitted by law; [4] nor that he is going abroad for a short time in the ordinary course of his business; [5] nor, if an officer in the army, that he is going abroad along with or to join his regiment.[6]

83. The caution which the debtor is required to find as an alternative to imprisonment is caution *de judicio sisti*. Caution *judicatum solvi* cannot be required. A creditor who obtains and enforces a *fugæ* warrant is liable in damages if the proceedings are wrongful.[7] The competency of the proceedings may be challenged by a suspension and liberation.[8] The grounds of suspension may be an objection to the petition as not sufficiently specifying the debt,[9] or to the warrant itself as *ultra petita*,[10] or as wanting in specification,[11] or as incompetently granted,[11] or to irregularities in the execution of the warrant.

Subsection (8).—*Privilege of Sanctuary.*

84. Under the privilege of sanctuary debtors were from a remote period enabled to obtain immunity from personal diligence by retreating

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[1] 1 & 2 Vict. c. 119, s. 25.

[2] Bell, Com. ii. 452; *Laing* v. *Watson and Mollison*, 1789, Mor. 8555.

[3] *Laing, supra*; Bell, Com. ii. 453.

[4] *Place* v. *Donnison*, July 2, 1814, F.C.; see para. 84, *infra*.

[5] Bell, Com. ii. 454; *Gorman* v. *Hedderwick*, 1827, 5 S. 291; *M'Kinnon* v. *Nairne*, 1831, 9 S. 615; *Anderson* v. *Anderson*, 1848, 11 D. 118.

[6] *Hamilton* v. *Bryson*, March 10, 1812, F.C.

[7] *Ford* v. *Muirhead*, 1858, 20 D. 949; *Swayne* v. *Fife Banking Co.*, 1835, 13 S. 1003; *Battersby* v. *Caldwell*, 1828, 6 S. 667; *Scot* v. *Sandilands and Manderston*, 1744, Mor. 8549; *Laing, supra*.

[8] Mackay, Pract. 463.

[9] *Pratt* v. *Fleet*, 1826, 4 S. 780 (N.E. 788); *Robertson* v. *Campbell*, 1847, 10 D. 125; *Jackson* v. *Smellie*, 1865, 4 M. 72.

[10] *Garrioch* v. *Wilson*, 1851, 13 D. 1377; *M'Cubbin* v. *Fulton*, 1852, 14 D. 908.

[11] *Muir* v. *Barr*, 1849, 11 D. 487.

to certain privileged precincts, such as the royal palaces and churches. Religious sanctuaries were abolished at the Reformation. The mint or "cunzie house" was formerly a sanctuary. Edinburgh Castle was at one time thought to be so also, but the contrary was decided in 1714.[1] The only sanctuary which has existed within modern times is the "Abbey of Holyrood House." The area over which the privilege extended covered a circuit of about four and a quarter miles, including Arthur's Seat and Salisbury Crags. The right of sanctuary afforded protection to civil debtors only, and did not extend to debtors of the King, or to criminals (including fraudulent bankrupts), or to persons under diligence for performance of a fact within their power. By passing within the limits of the sanctuary a debtor was protected for twenty-four hours only, but he might obtain immunity so long as he remained there by having his name entered in the record of the Abbey Court.

85. The privilege, although not abolished, became practically obsolete after the passing of the Debtors Act, 1880,[2] so far as ordinary debtors were concerned. By the Act 1696, c. 5, retiral of an insolvent debtor to the Abbey, combined with diligence by horning or caption, was declared to constitute notour bankruptcy. By the Bankruptcy Act, 1856,[3] it was enacted that notour bankruptcy should be constituted, *inter alia*, by insolvency concurring with a duly executed charge for payment, followed, where imprisonment is competent, by retreat to the sanctuary for twenty-four hours. This mode of constituting notour bankruptcy was, in the case of all ordinary debtors, superseded by the provisions of the Debtors Act, 1880, but until 1913 it remained applicable to debtors (other than Crown debtors) who were not exempted from imprisonment by that Act[4] or by the Civil Imprisonment Act, 1882. The Act of 1856 was repealed by the Bankruptcy (Scotland) Act, 1913,[5] which contains no corresponding provision.

Section 3.—Imprisonment Since 1880.

Subsection (1).—*The Debtors Act*, 1880.

86. Imprisonment for debt was abolished in Scotland by the Debtors (Scotland) Act, 1880,[2] except in the following cases: (1) Taxes, fines, or penalties due to His Majesty, and rates or assessments lawfully imposed or to be imposed; (2) sums decerned for aliment.[6] In these excepted cases it was further provided by the Act that no person should be imprisoned for a longer period than twelve months; but where a person has undergone twelve months' imprisonment for non-payment of a sum due under a decree for aliment this does not prevent his further imprisonment for additional sums becoming due under the same decree.[7] The Act is declared not to affect the apprehension or im-

[1] *M'Kay* v. *Campbell and Steuart*, 1714, Mor. 14305.
[2] 43 & 44 Vict. c. 34.
[3] 19 & 20 Vict. c. 79, s. 7.
[4] Bell, Com. ii. 461; Ersk. iv. 3, 25.
[5] 3 & 4 Geo. V. c. 20, s. 5.
[6] 43 & 44 Vict. c. 34, s. 4.
[7] *Walker* v. *Bryce*, 1881, 9 R. 249.

prisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*.[1]

SUBSECTION (2).—*Alimentary Debts.*

87. The exemption from ordinary diligence by imprisonment was extended to alimentary debts by the Civil Imprisonment Act, 1882,[2] but it was thereby enacted [3] that any Sheriff or Sheriff-Substitute may commit to prison, for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decerned for, or such instalment or instalments thereof as he may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process for which decree has been pronounced against him by any competent Court.

88. The warrant to commit to prison may be applied for by the creditor without any concurrence. The application is to be disposed of summarily and without written pleadings. The failure to pay is to be deemed wilful until the contrary is proved; but a warrant is not to be granted if it is proved to the satisfaction of the Sheriff or the Sheriff-Substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable.

89. A warrant of imprisonment may be granted of new, subject to the same provisions and conditions, at intervals of not less than six months against the same person, in respect of failure to pay the same sum or sums of aliment and expenses of process, if or in so far as still remaining due, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable, or any sums afterwards accruing due under the decree, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable.

90. The imprisonment does not to any extent operate as a satisfaction or extinction of the debt or interfere with the creditor's other rights or remedies for its recovery. The creditor is not liable to aliment or contribute to the aliment of his debtor while incarcerated under the warrant, but the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise applicable to the class of prisoners committed for contempt of Court.

91. The Sheriff's judgment committing a person to prison may be reviewed by the Court of Session, although it has been questioned whether a judgment refusing a warrant would be appealable.[4] An appeal from the Sheriff-Substitute to the Sheriff seems to be incom-

[1] 43 & 44 Vict. c. 34, s. 5.
[2] 45 & 46 Vict. c. 42.
[3] *Ibid.*, s. 4.
[4] *Tevendale* v. *Duncan*, 1883, 10 R. 852.

petent.[1] Payment of arrears of aliment may be enforced by imprisonment under the Act.[2] A decree in favour of a third party against the father of an illegitimate child for repayment of sums expended in alimenting the child is a decree, not of aliment, but of relief, and therefore does not warrant imprisonment as a means of enforcing it.[3] Similarly, a claim by the mother of an illegitimate child for arrears of aliment due many years previously is really a claim for re-imbursement of sums expended, and does not therefore fall within the exceptions to s. 4 of the Act. A sum decerned for aliment implies that there is someone waiting to be alimented.[4]

Subsection (3).—*Rates and Assessments.*

92. The 1882 Act also modified the liability to imprisonment in the case of rates and assessments by enacting that no person shall, on account of failure to pay rates and assessments, be imprisoned for a longer period than six weeks in all at the instance of the rating authority or authorities of any one parish, combination, district, county, or burgh, in respect of his failure to pay the rates and assessments due for any one year, without prejudice to any other rights and remedies competent to the rating authority.[5]

Subsection (4).—*Protection of Civil Prisoners.*

93. By the Debtors Act, 1880, it is provided that at least once in every four weeks it shall be the duty of the governor or principal officer in charge of every prison in Scotland to make a report to the Sheriff of the county within which such prison is situated setting forth the name and designation of every civil prisoner detained in such prison, the ground and warrant of his imprisonment, and the period for which he has been so detained; and it shall be lawful for the Sheriff to direct any civil prisoner to be brought before him, and, if he shall think fit, the Sheriff may determine that the assistance of one of the procurators for the poor shall be afforded to such prisoner in raising a process of *cessio bonorum*.[6]

Subsection (5).—Meditatio Fugæ *Warrant.*

94. The Debtors Act, 1880, which abolished imprisonment for debt in the case of all ordinary civil debts, contains the following provision as to "*fugæ* warrants": "Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."[7] Considerable doubt

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[1] *Strain* v. *Strain*, 1886, 13 R. 1029. [2] *Cain* v. *M'Colm*, 1892, 19 R. 813.
[3] *Mackay* v. *Parish Council of Resolis*, 1899, 1 F. 521.
[4] *Glenday* v. *Johnston*, 1905, 8 F. 24 (distinguishing *Cain*, *supra*).
[5] 45 & 46 Vict. c. 42, s. 5. [6] 43 & 44 Vict. c. 34, s. 10. [7] *Ibid.*, s. 4.

was entertained after the passing of the Act as to the effect of this provision.[1] It has, however, been decided that it only conserves the general rule of law which gives the remedy of *meditatione fugæ* warrants in cases where diligence by imprisonment may competently be done, and that, accordingly, in all cases where imprisonment for debt is not now competent, such warrants cannot be used.[2] The only classes of debtors, therefore, who can now be apprehended and imprisoned as *in meditatione fugæ* are the following: (1) Debtors for taxes or penalties due to His Majesty; (2) debtors for rates and assessments lawfully imposed; (3) debtors under decrees or obligations *ad factum præstandum*. The power to imprison for failure to pay sums decerned for aliment under the Civil Imprisonment (Scotland) Act, 1882,[3] is a discretionary power in the Sheriff and not a creditor's right of diligence, and it accordingly does not seem to infer the competency of *fugæ* warrants in such cases.

[1] *Kidd* v. *Hyde*, 1882, 9 R. 803. [2] *Hart* v. *Anderson's Trs.*, 1890, 18 R. 169.
[3] 45 & 46 Vict. c. 42, s. 4.

IMPRISONMENT, WRONGFUL.

See ABUSE OF CIVIL PROCESS; REPARATION.

IMPROBATION OF DEEDS.

See DEEDS, EXECUTION OF; REDUCTION.

IMPROVEMENT.

See AGRICULTURAL HOLDINGS ACTS; ENTAIL; LEASE.

INCEST.

INCITING TO MUTINY OR DESERTION.

See CRIME.

INCOME TAX.

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PART I.—INCOME TAX.

Section 1.—General Aspects.

Subsection (1).—*The United Kingdom.*

95. The constitutional changes effected by the setting up of the Irish Free State have altered the scope of what was previously known as United Kingdom income tax. Subject to what is stated below [1] the tax now applies only to Great Britain and Northern Ireland. For convenience the term "United Kingdom tax" has been retained throughout this article, but it must be read subject to this initial paragraph.

Subsection (2).—*Application to Scotland.*

96. The Income Tax Acts are mainly conceived and expressed from the point of view of English law and practice, and that has to be kept in view and allowed effect when they come to be applied in Scotland. Moreover, it is clearly desirable that legislation of such a kind should operate equally in both countries.[2] A good illustration is the wide meaning given to the word "charity" in accordance with the practice of the Court of Chancery in England, as contrasted with the narrow Scottish conception of the relief of indigence only.[2]

Subsection (3).—*Construction of Taxing Acts.*

97. Before the tax can be enforced it must be shewn by the Crown that the case is within the enactment. But if that can be done, it is then irrelevant for the subject to plead hardship or inequity.[3] A strong illustration was when, owing to a variation of a few days in the dates of a company's annual general meeting two years' dividends became receivable in one tax year; both were held super-taxable in the year following.[4]

Subsection (4).—*Evasion and Avoidance.*

98. The distinction between evasion and avoidance is frankly and fully recognised, both officially from the Treasury Bench in the House of Commons and judicially. Evasion is subterfuge to escape payment of tax for which liability has been incurred. Avoidance is the adoption of methods, and the shaping of one's transactions, so as to prevent tax liability being incurred. The latter course is recognised both officially and judicially as the undoubted right of the subject. "How far such considerations influenced him it is irrelevant to enquire, for nobody is under any obligation so to lay out his estate or the estate

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[1] See para. 287, *infra*.

[2] *Special Commissioners* v. *Pemsel*, [1891] A.C. 531; 3 Tax Cases 53.

[3] *Coltness Iron Co.* v. *Black*, 1881, 8 R. (H.L.) 67; 6 App. Cas. 315.

[4] *Duncan* v. *Commrs. of Inland Revenue*, 1923 S.C. 388; 8 Tax Cases 433, since altered by Finance Act, 1927, s. 34.

of his family as to make it subject to avoidable taxation." [1] In this connection it is pertinent to note that, while s. 20 of the 1922 Act was no doubt intended to counter certain methods of avoidance, and may to some extent have operated in that direction, it is undoubtedly also the fact that the indications in that section have been largely used as authoritative guides on methods of avoidance under which a considerable amount of stamp duty on deeds of temporary obligation has been received by the Exchequer.[2]

Subsection (5).—*Only One Income Tax.*

99. Though, as we shall see, the tax is assessed under five schedules, there is only one income tax.[3] The super-tax was a phase of income tax,[4] and even more plainly the new sur-tax is a part of income tax.[5] The tax under Schedule A is often called property tax or the landlord's tax; under Schedule B, the farmer's tax; and under Schedule D, the trader's tax. In fact none of these names is accurate or exhaustive; but in any case the schedules are merely of the nature of classification for convenience.[6] The classification is not rigid, for cases occur of assessment under one schedule but according to the rules of another schedule.[7] Much the same may be said of the six cases into which Schedule D is subdivided, and in that case it happens sometimes that a source of profit or gain is capable of being assessed under more than one case, and then the Crown has the option of assessing under either.[8]

100. But there is to be no double taxation. That is a fundamental rule, and it is specifically enforced by statute with machinery for rectification of any breach.[9] The rule means that the same money is not, in the same tax year, to be twice taxed in the hands of the same person. No breach of the rule is involved in the same money being traced as income of more than one person in the same tax year, and taxed in both or all the cases. Nor is it to be assumed that the rule operates against double taxation of the same income in the same year in the hands of the same person, once in the United Kingdom and once in some other country whether within the Empire or not. That is a separate problem, which has so far been dealt with in the following cases: (1) The Irish Free State,[10] (2) other British Dominions,[11] and (3) shipping profits.[12]

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[1] Lord Pres. in *Linton* v. *Inland Revenue*, 1928 S.C. 209. [2] See para. 286, *infra*.

[3] *London County Council* v. *Attorney-General*, [1901] A.C. 26; 4 Tax Cases 265; *Inland Revenue* v. *Pakenham*, [1927] 1 K.B. 611.

[4] Income Tax Act, 1918, s. 4; *Bowles* v. *Attorney-General*, [1912] 1 Ch. 123; 6 Tax Cases 136.

[5] Finance Act, 1927, s. 38. [6] Income Tax Act, 1918, s. 208.

[7] Nurseries and Market Gardens, Income Tax Act, 1918, Sched. B, rule 8.

[8] *Liverpool, London, and Globe Insurance Co.* v. *Bennett*, [1913] A.C. 610; 6 Tax Cases 326; *Revell* v. *Edinburgh Life Insurance Co.*, 1906, 5 Tax Cases 221.

[9] Income Tax Act, 1918, s. 151, Miscellaneous Rules, Sched. D, rule 5; see *Holborn Viaduct Land Co.* v. *Rex*, 1887, 2 Tax Cases 228; also Finance Act, 1923, s. 24 (error or mistake).

[10] See para. 287, *infra*. [11] See para. 288, *infra*. [12] See para. 292, *infra*.

SUBSECTION (6).—*Tax is on Income only.*

101. Income tax is a tax on income.[1] In this paragraph that is taken only in the sense that capital is not to be taxed. As a general proposition this is unchallengeable, but there are great difficulties in its application. Where capital is sunk by a taxpayer in the purchase of an annuity on his own life and for his own benefit, undoubtedly each payment which he receives exhausts part of the capital, and when the annuity expires the whole capital is gone; nevertheless income tax is chargeable on the full periodical payments of the annuity. If that annuity were to be sold to an investor it may perhaps be thought that the case is still harder, for the purchaser may survive the seller, yet on the seller's death the annuity lapses and the purchaser's capital has disappeared. Again, the incidence of income tax on rents derived from heritage is the same whether the title is perpetual feu or terminable leasehold, and whether the property be permanent land or wasting minerals, and in the latter case irrespective of the proximity in time to total exhaustion. On the other hand, something like concessions are seen in the allowance for wear and tear of plant and machinery and the extra allowance from manufacturing profits for the effect of the working of machinery on the buildings of mills and similar works.

102. Another phase of the difficulty of distinguishing between non-taxable capital and taxable income is the case of increments on realisation. If a man sells his house in which he has resided for a number of years and gets more than he paid for it, beyond all question the increment is not income.[2] It makes no difference though the property be manufacturing or trade premises.[3] Nor is the length of time between buying and selling at all conclusive or of itself even material. These considerations have application also to dealings on the Stock Exchange; in fact, so far as known, no attempt has ever yet been made to treat as assessable income profits made in that way by an individual, at least if not a stockbroker; for one thing, from the point of view of the Department, it would no doubt be as broad as it is long, for if the principle or rule were once adopted, it would have to be applied both ways, and deficits on such dealings would be "losses" under the Income Tax Acts in respect of which relief could be claimed.[4] Even in the case of trust investment companies, as distinct from finance companies, gains from realisations of investments are not treated as assessable profits if under the articles of the company, as originally adopted or as altered, such gains are to be carried, not to profit and loss, but to reserve. In the latest case on this branch of the subject it was held in the House of Lords that the proper test is whether the sum in dispute is a gain

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[1] *London County Council* v. *Attorney-General*, [1901] A.C. 26; 4 Tax Cases 265; *Secretary of State for India* v. *Scoble*, [1903] A.C. 299; 4 Tax Cases 618.

[2] *Commrs. of Taxes* v. *Melbourne Trust*, [1914] A.C. 1001.

[3] *Assets Co., Ltd.* v. *Forbes*, 1897, 24 R. 578; 3 Tax Cases 542.

[4] Finance Act, 1927, s. 27.

made in an operation of business in carrying out a scheme of profit-making. What was there involved was the increment on a sale of foreign patents, and, reversing the judgment of the Court of Appeal, this was held to be a taxable profit. The case is a good illustration of the great weight attached to the findings of the Commissioners.[1]

103. Yet another phase of the "capital or income" problem is seen in relation to deductions allowable from trade and professional profits. Repairs and renewals are passed, but improvements and extensions are rejected. The replacement of a motor delivery van is allowable, but the purchase of a second van to cope with increasing business, or to attend better to existing business, is an extension, and is rejected as being capital expenditure. A medical man is allowed to replace a car by another of the same class and power, but if he purchases a more expensive type of car the difference is capital expenditure. Ordinary advertising is a routine trade expense, but special propaganda methods to inaugurate new premises are in whole or in part capital expenditure. Thus it is seen that the exclusion of capital from tax cuts both ways.

Section 2.—Administration.

Subsection (1).—*Commissioners of Inland Revenue.*

104. Subject to the control of the Treasury,[2] all duties of income tax are under the care and management of the Commissioners of Inland Revenue.[3] These officials are totally different from the General and Special Commissioners mentioned below; the Commissioners of Inland Revenue are, however, *ex officio* Special Commissioners.[4] They have authority over all inspectors of taxes and all other officers or persons employed in the execution of the Income Tax Acts.[5] They fix the relief to landlords in Scotland in respect of rates.[6] Appeals may be taken to them in Schedule D cases against assessments made by the Special Commissioners; this right of appeal is not limited to questions of fact,[7] but it is apparently in desuetude. They have jurisdiction on questions of domicile and residence.[8] It is by their order that proceedings are taken for fines, penalties, and forfeitures.[9] They have powers with reference to relief claims by non-residents, and in this case there is an appeal from them to the Special Commissioners;[10] also in reference to accounting periods, in which case an appeal lies to the General or Special Commissioners.[11] The Commissioners of Inland Revenue are, ultimately, the "headquarters" to which inspectors of taxes refer at important stages of adjustment discussions.

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[1] *Inland Revenue* v. *Rees Roturbo Development Syndicate*, [1928] A.C. 132.
[2] Inland Revenue Regulation Act, 1890, s. 1.
[3] Income Tax Act, 1918, s. 57.
[4] *Ibid.*, s. 67 (1).
[5] *Ibid.*, s. 75.
[6] *Ibid.*, Sched. A, No. V. rule 4.
[7] *Ibid.*, s. 147.
[8] *Ibid.*, Sched. C, rule 2 (*d*); Sched. D, Case IV. rule 2; Case V. rule 3; Finance Act, 1924, s. 27.
[9] Income Tax Act, 1918, s. 221.
[10] Finance Act, 1920, s. 24.
[11] Income Tax Act, 1926, s. 34.

Subsection (2).—*Special Commissioners.*

105. The Special Commissioners are paid civil servants and whole-time officers. They are, nevertheless obviously, and even notoriously, unbiassed in all assessment matters. Super-tax and sur-tax are under their control.[1] Schedule D assessments are made by them if the taxpayer so elects.[2] Appeals under Schedule D and Schedule E may be taken either to them or to the General Commissioners, and in the former case even though assessment by the Special Commissioners was not claimed.[3] The Special Commissioners deal with most repayment claims, proceeding on the certificate of the General Commissioners in the ordinary claims for allowance or deduction.[4]

Subsection (3).—*General Commissioners.*

106. The General Commissioners have local jurisdiction. They are unpaid honorary officers. They appoint additional Commissioners who, in conjunction with the officials, do the actual work of assessment under Schedule D. The additional Commissioners may or may not be General Commissioners; if they are, they cannot sit on any appeal against an assessment made by them as additional Commissioners.[5] Schedule D assessments are made by the General Commissioners unless the taxpayer elects to be assessed by the Special Commissioners.

Subsection (4).—*Inspectors of Taxes.*

107. The Inspector of Taxes is the official (or authority) best known to the public and their advisers in connection with the administration of the income tax code. His functions have, at least in form, been augmented by s. 43 of the Finance Act, 1927. Notices of appeal go to him, and it is he who conducts all negotiations regarding assessments and repayments. It is officially announced with emphasis that those officials do not benefit, either directly in remuneration or indirectly in departmental consideration and prestige, by the fact that the tax yield in a district has increased under their period of office in that district.

Section 3.—Total Income.[6]

Subsection (1).—*General.*

108. Total income means the figure brought out by the two following operations: (1) Adding together all items which under the tax code are regarded as income for tax purposes, and all ascertained in accordance with the Income Tax Acts; and (2) from that total deducting all "charges" in the year of assessment. It is thus obvious

[1] Income Tax Act, 1918, s. 7.
[2] *Ibid.*, s. 123.
[3] *Ibid.*, s. 148; Finance Act, 1922, s. 19.
[4] Income Tax Act, 1918, s. 29.
[5] *Ibid.*, s. 65 (4).
[6] Finance Act, 1927, s. 38 (2); s. 39 (2).

that the result is a notional or statutory income, and not the taxpayer's actual income of the year. To begin with, a very general basis is now the figures of last year; a partner's share of the firm's notional profits is arrived at in a manner which often divorces it further from reality; many things which are partly capital are treated as wholly income; many items which are most valuable annual earnings are treated as not being income at all; and income from some kinds of foreign possessions is not reckoned if not brought home.[1] The charges keep much nearer to reality; they include ground burdens on heritable property, interest on mortgages, bonds, and advances, minister's stipend and annuities, but not such items as expenses of collection. The artificial "income" thus brought out is the total income for the purposes of the Income Tax Acts. The figure here referred to is before deduction of any earned income relief or any personal or marriage or other tax allowances. This is the figure which regulates allowances depending on total income, *e.g.* the life assurance relief. The gross income figure may be £900 and charges £300, leaving £600; and then reliefs and allowances may bring this down to £300. In such a case, life premiums may pass up to £100, being one-sixth of £600; they can neither rise to £150 (one-sixth of £900) nor do they fall to £50 (one-sixth of £300). When relief claims are allowed to persons not resident in the United Kingdom there is a reference (1920 Act, s. 24) to "total income from all sources, including income which is not subject to income tax charged in the United Kingdom," but that is an exceptional case for an exceptional purpose.

Subsection (2).—*Particular Items and Sources.*

(i) *Betting.*

109. The following are not assessable: (1) Betting gains, not being profits of a bookmaker's business;[2] (2) lottery prizes; (3) competition prizes. But speculative transactions on produce markets are assessable;[3] *quære* as to speculations in foreign exchange.

(ii) *Industrial Insurances.*

110. The following are not assessable: (1) Sick pay; (2) unemployment pay; (3) sums received under accident insurances over an indefinite period; but accident payments over a fixed period are in practice treated as income.

(iii) *Scholarships.*

111. Scholarships held by any person receiving full-time instruction at a university, college, school, or other educational establishment are not assessable. Scholarship includes exhibition, bursary, and any other educational endowment. This is by specific enactment,[4] but so far as

[1] See para. 219, *infra*. [2] *Graham* v. *Green*, [1925] 2 K.B. 37; 9 Tax Cases 309.
[3] *Cooper* v. *Stubbs*, [1925] 2 K.B. 753; 10 Tax Cases 29. [4] Finance Act, 1920, s. 28.

the benefit is received only in kind, *e.g.* education, residence, and board, it would not in any case be assessable income.

(iv) *The Fighting Services.*

112. The following are not assessable: (1) Wound and disability pensions;[1] (2) demobilisation gratuities;[2] (3) naval prize money; (4) children allowances by the Ministry of Pensions to widows;[3] (5) interest of funds of regimental institutes in the strict sense, as being Crown property.

(v) *Official Residences.*

113. Official residences are not assessable where the occupier has no power to let and may perhaps even be bound to occupy them.[4] The same applies to all relative perquisites in kind, *e.g.* rates, board, light, heating, service. The reason is that they are not things which can be turned into money, but it is otherwise if board, etc., are supplied on the basis of a deduction from gross cash wages.[5] It is also otherwise if there is a right to let the house and so to turn it into cash, and in that case there is no set-off on account of any house for which the person assessed may pay rent instead.[6] But houses in the United Kingdom belonging to the Crown, and occupied by officers of the Crown, are assessed under Schedule A,[7] and the official view is that it follows that the annual value of the house is part of the officer's income. Another exception is the rectories and vicarages of the clergy of the Church of England and the manses of the ministers of the Church of Scotland; from the peculiar legal relation it is held that the annual values are official income.[8] The same rule does not hold in the case of the manses and houses of nonconformist and dissenting ministers,[9] but in those cases the occupants have the option to treat their rent-free houses as part of income.[10] In all cases where official residences are treated as income it is earned income.

(vi) *Savings Certificates.*

114. Accumulated interest on National Savings Certificates,[11] also on Northern Ireland Savings Certificates, if held by persons domiciled and resident there,[12] is not assessable.

(vii) *Co-operative Dividends.*

115. Co-operative dividends on purchases escape assessment, but not dividends on shares in the society or interest on loans to the society;

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[1] Finance Act, 1919, s. 16. [2] *Ibid.*, s. 17. [3] Finance Act, 1922, s. 27.
[4] *Tennant* v. *Smith*, [1892] A.C. 150 ; 3 Tax Cases 158.
[5] *Machon* v. *M'Loughlin*, 1926, 11 Tax Cases 83.
[6] *Wylie* v. *Eccott*, 1913 S.C. 16 ; 6 Tax Cases 128. [7] Sched. A, No. VII. rule 11.
[8] *Corke* v. *Fry*, 1895, 22 R. 422 ; 3 Tax Cases 335.
[9] *M'Dougall* v. *Sutherland*, 1894, 21 R. 753 ; 3 Tax Cases 261.
[10] Finance Act, 1919, s. 22. [11] Income Tax Act, 1918, s. 47. [12] Finance Act, 1922, s. 28.

but these are commonly paid without deduction of tax, leaving the liability, if any, to be met by direct assessment.

(viii) *Voluntary Allowances (Gifts).*

116. These are not assessable, though constantly and regularly received from the same source, so long as they are neither paid under legal obligation nor on account of the official position held by the payee. A clear case of exemption is where a well-to-do uncle pays each of his nieces £25 quarterly without being bound to do so; these payments are neither "income" to the nieces nor deductions from the uncle's income, whether for income tax or for sur-tax. If they were made to rest on legal obligation there might be considerable tax savings, that depending on the income position of the parties otherwise.[1] But the mere fact that payments are voluntary and could not be legally exacted is not enough to exclude them from the income account if the recipient gets them by virtue of holding, or because he holds, a certain office. A good example of this is the case of Easter offerings to clergy of the Church of England [2] which are chargeable because they are given to the incumbent as such, and are therefore received by him by virtue of his office. It has been suggested that a special offering or present expressly to meet the expense of, say, foreign travel, might escape, and in any case contributions by non-parishioners may be in a different position. In somewhat the same connection the following have been held not assessable: Easter offerings proved to have been prompted partly by the personal consideration of the incumbent's *res angustæ domi* [3] (but now *quære*), an allowance from a curate's augmentation fund,[4] and a grant from the sustentation fund of a diocesan poor benefices' fund.[5] The following have been held assessable: A voluntary contribution by the congregation,[6] a grant from the Queen Victoria clergy sustentation fund,[7] a grant from a stipend augmentation fund,[8] and a grant from the aged and infirm ministers' fund of the Church of Scotland,[9] which was held to be taxable under Schedule D as an annuity received without deduction of tax.[9]

117. There have been many cases with reference to special payments or honoraria to secretaries and liquidators of companies, as well as to persons in humbler positions.[10] It may be said that such payments are not assessable if all the following questions can be answered in the affirmative: Was it a gift after holding office? Was it a free-will offering personal to the recipient? Was it a testimonial? Such pay-

[1] See para. 192, *infra.* [2] *Blakiston* v. *Cooper,* [1909] A.C. 104; 5 Tax Cases 347.
[3] *Turton* v. *Cooper,* 1905, 92 L.T. 863; 5 Tax Cases 138.
[4] *Turner* v. *Cuxon,* 1888, 22 Q.B.D. 150; 2 Tax Cases 422.
[5] *Hue* v. *Miller,* 1900. See Murray and Carter on Income Tax, 11th ed., p. 56.
[6] *Inland Revenue* v. *Strang,* 1878, 15 S.L.R. 704; 1 Tax Cases 207.
[7] *Herbert* v. *M'Quade,* [1902] 2 K.B. 631; 4 Tax Cases 489.
[8] *Poynting* v. *Faulkner,* 1905, 93 L.T. 367; 5 Tax Cases 145.
[9] *Duncan's Exrs.* v. *Farmer,* 1909 S.C. 1212; 5 Tax Cases 417.
[10] *Benyon* v. *Thorpe,* 1928, 44 T.L.R. 610.

ments have been held not assessable when voted after the liquidation was ended and where the facts were such that the view prevailed that the money was paid by gratified beneficiaries and not by employers,[1] and again where a very large sum was voted to the managers of a company on voluntary liquidation in the shape of compensation for loss of office;[2] but the mere fact that the payment is for services outside of the recipient's ordinary duties, and which he could not have been compelled to render, will not avoid taxation.[3]

118. Payments to jockeys and "benefits" for games professionals have also produced several cases in this category. A present by the horse's owner to a successful jockey[4] and an association football player's benefit money[5] have both been held to be assessable. On the other hand, subscriptions on the occasion of a cricket professional's benefit match appear to be admitted not to be assessable, and the like was held regarding the gate money on the same occasion.[6]

(ix) *Letting Furnished Houses.*

119. If this is done systematically, the profit, properly ascertained, is income, and then it is usually regarded as earned income. But it may also be an instance of an isolated transaction,[7] in which case the whole question is still open, for the decision sometimes founded on to shew that even then the profit is assessable income proceeded on admission.[8]

(x) *Exceptional Trust Cases.*

120. The following have been held not to come into the computation of total income: (1) The personal privilege of occupying a house during the pleasure of trustees;[9] (2) the right of occupation of heritage as distinguished from a proper liferent right, and even though tax under Schedules A and B is payable by the beneficiaries in question;[10] (3) income of a trust fund settled by the taxpayer himself on his own marriage on ordinary family trusts, starting with a life interest to himself, so far as the income is applied by the trustees towards repayment of the life-renter's heritable bonds under a direction to that effect in the marriage contract;[9] and (4) where, owing to special circumstances the trustees had not denuded in favour of a liferent beneficiary, the income of the estate was held to be income of the beneficiary only to the extent of actual payments to him by the trustees.[11]

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[1] *Cowan* v. *Seymour*, [1920] 1 K.B. 500; 7 Tax Cases 372.
[2] *Chibbett* v. *Robinson & Sons*, 1924, 132 L.T. 26; 9 Tax Cases 48.
[3] *Mudd* v. *Collins*, 1925, 133 L.T. 186; 9 Tax Cases 297; *Dauncy* v. *Howlett*, 1926, 135 L.T. 279; 10 Tax Cases 454.
[4] *Wing* v. *O'Connell*, [1927] I.R. 84.
[5] *Davis* v. *Harrison*, 1927, 43 T.L.R. 623.
[6] *Reed* v. *Seymour*, [1927] A.C. 554.
[7] See para. 157 *et seq.*, *infra*.
[8] *Wylie* v. *Inland Revenue*, 1913 S.C. 16; see *Martin* v. *Lowry*, [1927] A.C. 312.
[9] *Inland Revenue* v. *Wemyss*, 1924 S.C. 284; 8 Tax Cases 551; cf. *Tollemache* v. *Inland Revenue*, 1926, 43 T.L.R. 58.
[10] *Miller* v. *Inland Revenue*, 1928 S.C. 819.
[11] *Lockhart de Robeck* v. *Inland Revenue*, 1928 S.C. (H.L.) 34.

Section 4.—Assessable Income.

121. This is the figure which remains after there has been deducted from "total income" the earned income relief, if any is applicable, or the age relief, which is a special extension of the application of earned income relief. But to reach assessable income there is not deducted the wife's earned income relief, which is regarded as an addition to the marriage allowance. The distinction between assessable and taxable income points the rule that, except in the case of non-residents, no direct assessment is made on earned income without deducting the earned income relief, even though no claim has been made therefor.

Section 5.—Taxable Income.

122. To reach taxable income there are deducted from assessable income all the tax allowances, except that for life assurance. These allowances are as follows, viz. personal, marriage, wife's earned income relief, children, attendant daughter, dependent relatives, and housekeeper. An exception has already been stated, viz. life assurance, and another is rate relief. In both cases the reason is clear. Assuming that there is any taxable income at all, it means that the various allowances above mentioned as first deducted are given at the full standard rate of tax, and that is the law. But as to rate relief, the allowance is always given at only one-half of the standard rate; and as to life assurance, the relief varies between the full standard rate and one-half and one-fourth of that rate.[1]

Section 6.—Earned Income.

123. Earned income is defined in s. 14 (3) of the Income Tax Act, 1918, as follows:—

1. Any income arising in respect of any remuneration from any office or employment of profit held by any individual, or in respect of any pension, superannuation or other allowance, deferred pay, or compensation for loss of office, given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in respect of the past services of any deceased person, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay, or not.

2. Any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual.

3. Any income which is charged under Schedule B or Schedule D, or the rules applicable to Schedule D, and is immediately derived by the individual from the carrying on or exercise by him of his trade,

[1] See para. 319, *infra*.

profession, or vocation, either as an individual, or, in the case of a partnership, as a partner personally acting therein.

4. Civil list pensions.[1]

124. It will be observed that in the case of pensions, etc., the benefit of the earned income qualification may be extended to individuals who are not related to the individual by reason of whose services the pension is awarded. Firms are included, but not companies. Sleeping partners are not included, but it is necessary to have regard to the two senses of that term.[2] Directors' fees are earned income, and so, of course, are the salaries of managers and secretaries, but not where those offices are held by companies. Where a business is carried on by trustees, even though for beneficiaries in life, the profits are not earned income, "they are earned by trustees to whom they do not belong, and they belong to individuals who did not earn them." [3] The same rule has been applied to profits of a business carried on by a *curator bonis*.[4] But the part which the principal or a partner must take in the conduct of the business may be small, and it cannot be said that his personal presence at the place of business is necessary, or that it is fatal if he is physically absent for the whole tax year owing to bodily or mental illness, or a pleasure tour, or imprisonment.[5] Divestiture by bankruptcy is apparently fatal.[6] That the wife alone conducts the husband's business or *vice versa* is no objection.[7] It appears that the share of a limited partner, if an individual, would be earned income. *Quœre* whether deferred pay and pensions, if assignable and assigned, would still be earned income in the hands of the assignee.[8]

Section 7.—Trustees' Income.

125. In this field there have been recent important developments, not all in one direction. (1) Judicial decision has established that, at least in England, though the whole residue of an estate may be bequeathed to A, or to A and B, the income of the estate is not income of the beneficiaries from the date of death of the testator, but only from the date at which the residuary fund is ascertained, and that all income received by the trustees up to the latter date is income of the trustees, but is capital to the beneficiaries, for income tax purposes.[9] This obviously may operate in two ways, but it is said to prevent the beneficiaries obtaining refunds of tax on the earlier income. There is a modification in favour of charities.[10] (2) Another rule recently adopted is that appor-

[1] Finance Act, 1920, s. 33.

[2] See para. 220, *infra*, footnote.

[3] *Inland Revenue* v. *Shiels' Trs.*, 1915 S.C. 159 ; 6 Tax Cases 583.

[4] *M'Dougall* v. *Inland Revenue*, 1918, 56 S.L.R. 90 ; 7 Tax Cases 134.

[5] Cf. *R.* v. *Newmarket Income Tax Commrs., ex parte Huxley*, [1916] 1 K.B. 788 ; 7 Tax Cases 49.

[6] *Inland Revenue* v. *Fleming*, 1928 S.C. 759.

[7] Finance Act, 1918, s. 14 (4).

[8] For particulars of the earned income relief, see para. 199 *et seq.*, *infra*.

[9] *Ex parte Barnardo Homes*, [1921] 2 A.C. 1 ; 7 Tax Cases 646.

[10] Finance Act, 1922, s. 30 ; see para. 253 *et seq.*, *infra*.

tionments shall be according to the dates when the income is receivable, irrespective of when it accrued.[1] The Department maintains that it works thus: (*a*) income receivable prior to the death of the testator, but that only, is his estate, and a refund may be obtained in respect of it by the trustees; (*b*) income receivable after his death, which is in law apportionable to his estate, is income of the trustees, and no refund can be obtained; and (*c*) only after that is it income of the beneficiaries, and even that is, in residuary cases, subject to the other rule stated above. (3) Before ascertaining the income of, say, a liferenter, it is necessary to deduct all trust expenses applicable to income, or rather more, namely, the sum which, after deduction of tax, leaves the amount of those expenses;[2] but something may depend on the language of the will or trust deed in relation to expenses.

126. The foregoing rules appear to augment the importance of the intervention of trustees, but in other relations it appears that their existence is, for tax purposes, practically to be ignored. Thus the existence of British trustees will not subject a non-resident beneficiary to United Kingdom tax on income which would have been exempt if there had been no such trust;[3] and with reference to different bases of assessment, the trust income is to be regarded, not as a *unum quid*, but as split up into its different constituent items.[4]

Section 8.—Schedule A.

Subsection (1).—*Valuation.*

127. Under this schedule there is collected the tax on income from the ownership of land and other heritable property. The Crown is not bound by the Valuation Roll in those counties and burghs where the Inland Revenue official is not the Lands Valuation Assessor,[5] but generally the assessments are based on the entries in the Valuation Roll under certain deductions which are made whereby what is known as "the net Schedule A assessment" is brought out. It goes without saying that the gross starting figure may be more than the rent which is actually paid in the case of let property, for there may be "considerations other than the rent" passing from tenant to landlord, *e.g.* if the tenant pays a premium,[6] or is under obligation to execute all repairs, or to pay landlord's rates, or to erect, extend, or improve buildings. The same thing may happen if, in fact, the tenant makes structural additions or improvements though not bound to do so. The Crown is entitled to tax based on the fair value of the actual premises; the

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[1] Finance Act, 1927, s. 39 (2).

[2] *Murray* v. *Inland Revenue*, 1926, S.L.T. 714; 11 Tax Cases 133.

[3] *Singer* v. *Williams*, [1921] 1 A.C. 41; 7 Tax Cases 419; *Pool* v. *Royal Exchange Assurance Co.*, [1921] 1 A.C. 65; 7 Tax Cases 387.

[4] *Baker* v. *Archer Shee*, [1927] A.C. 844.

[5] *Menzies* v. *Inland Revenue*, 1878, 5 R. 531; 1 Tax Cases 148.

[6] *Davies* v. *Abbott*, 1926, 11 Tax Cases 575.

incidence of the tax is another matter. The additional payments by tenants under the Rent Restriction Acts are rent; [1] so are percentages payable by contract by tenants on expenditure made by the landlord. The question whether the terms stated in a lease are to be adopted depends upon the circumstances of the particular case.[2] When a common rent is stipulated for heritable and moveable assets there must be an apportionment.[3] Where there is a lease for years, with an increasing or decreasing rent, the actual rent of each year may not be the proper figure for the gross Schedule A assessment; the solution may, or may not, be found by taking an average.[4] As has been already stated, mineral rents are assessable, but the contrary was held regarding old heaps of colliery waste disposed of, for removal, at a rate per ton to be paid as removed.[5]

SUBSECTION (2).—*Transfers from Schedule A to Schedule D.*

128. The Finance Act, 1926 (s. 28), transferred, as from 6th April 1927, the assessment of certain kinds of income from Schedule A to Schedule D, with exceptions in the case of income falling to charities, friendly societies, etc. Teinds were formerly charged under Schedule A, No. II., on a three years' average, but now they are charged under Schedule D, Case III., on the figure of the preceding year. Much more important are the transfers from Schedule A, No. III., to Schedule D, Case I., which is the trading case. All those transferred profits are now accordingly taken on the profits of the preceding year. The transferred cases include quarries, mines, ironworks, gasworks, salt springs and works, alum mines or works, waterworks, canals, docks, markets, tolls, railways and other ways, ferries and other concerns of the like nature, having profits from or arising out of lands and heritages. Even before 1927 these concerns, though assessed under Schedule A, were assessed, not on the annual value of the heritage, but on the profits of the concern, in some cases on the amount of the preceding year, in some cases on a three years' average, and in some cases on a five years' average. Another rule (Schedule A, No. III. 6) was that the assessment should be exclusive of any lands used or occupied in connection with the concern if these lands were separately assessed to tax, an exception which was necessary to prevent double taxation. It was also provided (Schedule A, No. III. 5) that the assessment should be made before distribution to the owner of the soil or property, and he was bound to allow a proportional deduction of the tax from the payment to him. The assessment of the concerns in question having always been on profits, they are more appropriately now placed in Case I. of Schedule D,

[1] *Biddle* v. *Morris*, [1924] 2 K.B. 490 ; 9 Tax Cases 87.

[2] *Rae's Trs.* v. *Assessor for Dundee*, 1923 S.C. 699 ; *Stocks* v. *Sulley*, 1899, 1 F. 1020 ; 4 Tax Cases 98.

[3] *Campbell* v. *Inland Revenue*, 1879, 7 R. 82 ; 1 Tax Cases 234.

[4] *Inland Revenue* v. *Dickson's Exrs.*, 1928 S.C. 752.

[5] *Roberts* v. *Lord Belhaven's Exrs.*, 1925 S.C. 635 ; 9 Tax Cases 501.

but the old rules 5 and 6, above explained, are carried over into Schedule D so far as those undertakings are concerned (1926 Act, Third Schedule).

Subsection (3).—*Sporting Rights.*

129. In Scotland the rules are: (1) When both land and sporting rights are retained by the owner in his own hands there are assessments under both Schedules A and B on the annual value of the land as enhanced by the sport, but no separate assessments on the sporting rights; (2) when the owner retains the land and lets the sporting rights, the position is the same; there is no separate assessment under Schedule B on the sporting rights; (3) if both land and sporting rights are let together, the position is again the same; [1] (4) if both are let separately, the sporting rights are assessed under Schedule A only, and only on profit after deducting expenses borne by owner, *e.g.* keeper's wages, fishing assessments, etc.; (5) if the land is let and the sporting rights are not, there is no assessment under either A or B on the sporting rights.

Subsection (4).—*Deductions.*

(i) *Rates.*

130. Before assessment a deduction is made to cover rates payable by the landlord.[2] This is usually sufficient, but if not, an appeal will put it right; failing which there is a claim for refund.

(ii) *Repairs.*[3]

131. The deductions on this head are in Scotland calculated on the gross figures before the above deduction for rates. The deduction for repairs is one-eighth of the gross figure in the case of land and farm-houses and farm buildings, and in other cases according to the following scale: Annual value not exceeding £40, one-fourth; above £40 but not exceeding £50, £10; above £50 but not exceeding £100, one-fifth; above £100, £20 plus one-sixth of the excess of the value over £100. Thus, value £160, relief £30.

(iii) *Land Tax.*[4]

132. This deduction is allowed if land tax is assessed on the property even though it may be wholly or partly remitted owing to the amount of the owner's income. If the owner has an income not exceeding £160, he can obtain total relief from land tax; if his income exceeds £160

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[1] *Campbell* v. *Inland Revenue*, 1879, 7 R. 82; 1 Tax Cases 234 (lessee of a deer forest assessed under Sched. B on whole rent). It matters not that there are separate leases of land and sport to the same tenant; the rents are aggregated (*Rerell* v. *Scott*, 1895, 22 R. 772; 3 Tax Cases 403). This is not altered by a sublease of a restricted sporting right (*Millar* v. *Anderson*, 1922 S.C. 284; 8 Tax Cases 279).

[2] Sched. A, No. V. rule 4.

[3] *Ibid.*, rule 7.

[4] *Ibid.*, rule 1 (*e*); Finance Act, 1923, s. 28.

but does not exceed £400, he can obtain relief from one-half. But he must move before paying; land tax once paid, there is no legal right to repayment.

(iv) *Sea Walls, etc.*[1]

133. There is a statutory right of deduction for repairs on sea walls or embankments necessary for preservation or protection against the encroachment or overflowing of the sea or any tidal river. This is limited to the purposes stated and does not cover works intended to effect improvement.[2] It is calculated on a twenty-one years' average.

(v) *Unoccupied Property.*[3]

134. If the property is unlet and unoccupied for the whole or part of the year, corresponding tax relief is given if the property is unfurnished, and even though a caretaker resides on the premises. Strictly, this does not apply to land, but even there it may sometimes be obtained.

(vi) *Defaulting Tenants.*

135. Relief is given when rent is lost in whole or in part owing to a tenant absconding or defaulting and the landlord being in fact unable to recover the rent, or part of it, after enforcing his remedies, if there is anything to enforce them against. Land is included in this relief. There is no statutory rule for this relief, but it is conceded by the Department.

(vii) *Rents remitted.*

136. This relates to three cases: (1) Rents absolutely and finally remitted owing to agricultural depression; (2) rents remitted owing to losses to crops or stock from flood or tempest; [4] (3) this relief may be claimed by an occupying owner to the extent to which a tenant would in equity have been entitled to relief, and then it applies to both Schedule A [4] and Schedule B [5] or D.

Subsection (5).—*Excess Maintenance Claim.*

137. The allowances mentioned above for repairs are sometimes insufficient. An attempt has been made [6] to remedy this, but the remedy is partial in application and troublesome to work. It applies to all land, farmhouses and farm buildings, and other houses. If the allowances stated above are less than the expenditure on maintenance, repairs, insurance, and management, the excess is allowed, but not beyond the Schedule A tax paid on the property in question; if the expenditure reduces the income from the property to *nil* or *minus*, total repayment of tax on that property is obtained, but not any allowance as against

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[1] Sched. A, No. V. rule 1 (*g*).
[2] *Hesketh* v. *Bray*, 1888, 21 Q.B.D. 444; 2 Tax Cases 380.
[3] Sched. A, No. VII. rule 4.
[4] Sched. A, No. V. rule 9.
[5] Sched. B, rule 3.
[6] Sched. A, No. V. rule 8.

other Schedule A tax or against any other tax.[1] But the expenditure which is taken as the test is not the actual expenditure of the year; it is the average of the expenditure of the five preceding years. If part of the property has been sold, the figures in the years of average relating to the sold part must necessarily be excluded in working out the average for the part of the property still retained and for which the claim is being prepared. If the taxpayer has not been owner for five years, the previous ownership is reckoned on if the figures are available; if not, the average is limited to the taxpayer's period of ownership, though less than five years. In the first year of ownership the actual figures of the year will usually be accepted, if that method is agreed to by the taxpayer for each of the next four years also.

138. "Maintenance" includes anything necessary to maintain the existing rent, including, if so necessary, replacement of farmhouses and other buildings, fencings, etc. The following are examples of what are covered: (1) Repairs to greenhouses, vineries, etc.; to electric plant, batteries, etc.; to heating apparatus, including replacement of boiler; (2) maintenance of pumping machinery for water supply to a residence; (3) improvements or additions, not beyond what is now required by sanitary authorities if the rent is not increased; (4) expense of obtaining records of farm buildings under the Agricultural Holdings Act; (5) expense of obtaining a certificate of bad farming, but not compensation for disturbance; (6) expense of arbitrations with tenants; (7) net Schedule A assessment of, and repairs on, estate offices and workshops; (8) salaries and wages, cash and in kind, including rent-free houses to employees, and perquisites; (9) pensions to employees. There must be some disallowance if either (1) the work includes additions or improvements (subject as above), or (2) the rent is increased owing to the expenditure; but those conditions are not always very strictly enforced. Redrainage is an important item, as to which there may be differences of opinion in individual cases as to whether it is merely renewal or is an improvement. Each estate or each property must be taken as a whole; the taxpayer is not allowed to pick out one farm or one house to suit himself.

139. What is in view is landlord's expenditure, and therefore anything that can be considered an occupier's item is excluded, *e.g.* compensation for unexhausted manures. Expenditure on the mansion-house and adjuncts is not, as such, excluded. Expenditure on minerals and fishings is excluded, because not within the enactment. Distinctions are drawn between cottages according to the purpose to which they are put. In the case of woodlands a claim of this nature is competent, but to a large extent the actual outlay is excluded on the theory that it is expense of cultivation, and therefore an occupier's outlay. Costs of litigation are not generally allowed, but there are important exceptions. On a number of the matters mentioned in this subsection

[1] *Crompton* v. *Campbell*, 1925 S.C. 124; 9 Tax Cases 224.

much helpful information is obtainable from Notes on the Subject of Maintenance Claims issued by the Scottish Land and Property Federation. A note in the Factors' Magazine for May 1927, p. 145, shews that on one estate £700 was passed for expenditure on greenhouses and vineries, definite improvements were excluded, but replacement was allowed, rejecting the inspector's argument that replacement is allowable only in the case of farm buildings. At a recent interview the Chancellor of the Exchequer assured representatives of the landed and farming interests that general instructions would be given to officials to interpret the law as liberally as possible in the case of agricultural estates.[1]

140. In view of the great and increasing importance of those claims there is here inserted certain information supplied by a firm with a very large experience in the management of landed estates and the preparation and adjustment of those claims.

(1) When all the property for which a claim is lodged is let, there is little difficulty in establishing the claim for any expenditure under replacements or improvements, but some difficulty arises when a claim is lodged in respect of property occupied by the owner or his servants. No rent is paid; therefore an increase in rent does not as a rule appear in the Valuation Roll even if such were justified. The authorities continually raise this question whenever a fairly large sum is involved on repairs carried out on property occupied by the owner or his servants.

(2) The expenditure, so far as house property is concerned, is easily classified. If the property is all tenanted and no increases in rent have been made, all the expenditure can be included. If a rent has been increased in respect of improvements, the expenditure relating to the improvements on that particular house must be excluded. An entirely different situation arises in the case of claims for estates. Upon many estates in Scotland the staff includes a joiner, mason, and plumber, who are employed no doubt to keep the buildings, etc., in a proper state of repair, but also to erect any buildings and carry out any improvements necessary upon the estate. The wages paid in respect of such employees should be included in the maintenance claim, but so far as they are employed upon work of a capital nature a proportion must be excluded. If a sawmill is owned by the proprietor, then in all likelihood the timber used for repairs will be cut and prepared upon the estate. After the work is complete it can be measured up and the cost of wood charged for, or, as an alternative, a certain percentage of the sawmill expenses, forester and staff wages, haulage, etc., can be entered in the claim, provided no timber from the sawmill is sold. If standing timber is sold, a percentage must come off in respect of forester's and other wages, and in any case the inspector of taxes will most likely claim that a certain percentage is beyond the scope of the claim. Upon the Form No. 99 (Inland Revenue) the expenditure relating to land and houses is requested separately, but when charging

[1] See the Factors' Magazine for August 1928, p. 287.

the wages of a joiner, plumber, or mason for work in all parts of the estate it is difficult to say what amount is applicable to lands and houses separately. Other items also raise this difficulty, and it has been found that it is not insisted that lands and houses should be shewn separately.

(3) Under the head of insurance should be included all premiums on workmen's compensation insurances in so far as relating to men employed upon repairs and maintenance. If the premiums on the fire policies cover shooting-lodges, etc. (furnished), the amount applicable to furnishings must be excluded. Under the head of management the factor's fee, audit fees, travelling expenses, etc., collecting rents, are chargeable; but in the case of estates a percentage is usually deducted from the factorial fee on the ground that a certain amount is beyond the scope of the claim. As against this, a percentage of the wages paid to a ground officer or manager (or a gamekeeper acting in that capacity) may be claimed as relating to supervision.

Subsection (6).—*Collection through Tenant.*

141. The general rule is that the Schedule A tax is assessed upon the tenant,[1] who is entitled to indemnify himself by deducting it from the rent,[2] and any agreement to the contrary is void.[3] But it is now usually assessed under deduction of the personal allowances to which the landlord is entitled, and the effect is that often it is cancelled altogether, except to the extent of tax on charges, *e.g.* feu-duty and bond interest. Once the tax has been assessed on the occupier, successive occupiers are liable without any new assessment,[4] but no occupier is liable beyond the period of his occupancy,[4] and questions of apportionment are settled by the General Commissioners.[5] If the proprietor prefers to be assessed direct, that will be done on his application.[6] This is a relief to the tenant, and it has the other advantage of securing that the landlord has immediate notice of any change in the assessment. In any case, the proprietor is assessed direct if (1) the rent is under £10, or (2) the premises are let for less than a year, or (3) they are let in different apartments and occupied by two or more separate tenants.[7]

142. When the collection is through the tenant, the general rule appears to be that the tenant must deduct the tax from "the first payment thereafter made on account of rent," [8] but at least there are the following exceptions or qualifications: (1) When the landlord has been assessed on buildings let in different apartments, if the tax is finally recovered from the tenants, they are entitled to deduct it from "the next or any subsequent payment" of rent; [9] (2) when the landlord has

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[1] Sched. A, No. VII. rule 1.
[2] Sched. A, No. VIII. rule 1.
[3] All Schedules, rule 23.
[4] Sched. A, No. VII. rule 3.
[5] All Schedules, rule 22.
[6] Sched. A, No. VII. rule 9.
[7] *Ibid.*, rule 8; *Williams* v. *Sanders*, [1927] 2 K.B. 798.
[8] Sched. A, No. VIII. rule 1; *Duke of Beaufort* v. *Inland Revenue*, [1913] 3 K.B. 48; *Hill* v. *Kirshenstein*, [1920] 3 K.B. 556; *Galashiels Provident Building Society* v. *Newlands*, 1893, 20 R. 821.
[9] Sched. A, No. VIII. rule 9.

elected to be assessed direct, the tenant still remains liable if the landlord defaults,[1] and in that case, if the tenant is called upon to pay the tax, he is entitled to deduct it from "the next or any subsequent payment" of rent; [2] (3) there is no rule that only one year's tax can be deducted by the tenant at one time, so if he is in the position of paying two or more years' rents at one time he may then deduct all the tax he has paid since his last rent payment; [3] (4) if the parties have agreed to let the refund of tax by landlord to the tenant run on for two or more years, the agreement is unobjectionable.[4] It must be admitted that some doubt still surrounds the whole question of the tenant's remedies, both whether he is limited to retention from his "next" rent payment, and whether retention is his only remedy or whether he can sue.[5] He cannot deduct the tax before he has paid it,[6] nor more than tax on the rent which he pays; [7] and if, for example, he pays a nominal rent in the first year because he has undertaken to execute repairs, he has to bear the burden himself.[8]

Section 9.—Schedule B.

Subsection (1).—*General Scope of Charge.*

143. Under this schedule tax is charged "in respect of the occupation of all lands, tenements, hereditaments, and heritages." The word "tenements" is not here used in the Scottish sense, and, besides, it is specifically enacted (Schedule B, rule 1) that there shall be no assessment under this schedule on (*a*) any dwelling-house or offices unless occupied by virtue of one and the same demise along with a farm of lands for the purpose of farming, or (*b*) any warehouse or other building occupied for the purposes of trade or profession. In the case of ironworks and similar concerns, which until 1927 were assessed under Schedule A, the commercial profits of the business were taken as the measure of the annual value. But, conversely, in the case of the occupation of land, the occupier has for long been, and he still is, entitled to require that the annual value of the land, or a certain proportion of it, shall be taken as covering all the profit which can be made from the occupation. This rule, which practically amounts to a privilege, especially as it is optional in favour of the occupier and of him only, is not limited to land occupied for husbandry. In the application of the rule at present, the figure taken is one year's rent or value [9] where the land is used for husbandry only or mainly, and one-third of the rent or value where that is not the case and where the use of the land for other purposes is not unreasonable.

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[1] Sched. A, No. VII. rule (9) 3.
[2] Sched. A, No. VIII. rule 10.
[3] *Kirk* v. *Cunnington*, [1921] 3 K.B. 637.
[4] *Lamb* v. *Brewster*, 1879, 4 Q.B.D. 607.
[5] *Agnew* v. *Ferguson*, 1903, 5 F. 879; Income Tax Act, 1918, s. 211 (2).
[6] *Barnes* v. *Kiffin*, [1916] W.N. 166.
[7] Sched. A, No. VIII. rule 1.
[8] *Moore* v. *Drughorn*, [1922] 2 K.B. 492.
[9] Finance Act, 1922, s. 23.

SUBSECTION (2).—*Husbandry.*

144. The following quotation is from the judgment of Sankey J. in an excess profits duty case.[1] "The contention for the Crown is that husbandry means farming and that it is impossible to say that persons who grow herbs . . . are farmers. I do not agree. . . . Husbandry is a term of very wide signification, and though I am not prepared to hold that a man who tills and cultivates the soil is in all circumstances a husbandman or a man engaged in husbandry, I can see no distinction between a man who does so in order to produce food for human consumption and a man who does so in order to produce medicines and drugs also for human consumption. Beyond that the question . . . is very much a question of fact and of degree, and such questions are for the Commissioners. . . . I think that the respondents were engaged in husbandry, that is, in tilling the soil and producing from it commodities for human consumption." This passage is useful as marshalling a number of considerations. No doubt the decision was correct, but the reasons may respectfully be questioned, *e.g.* that farming is narrower than husbandry, or that tilling the soil or production of human food is essential. The following are included in husbandry: Sheep-farming,[2] poultry-farming,[3] production of crops (potatoes) on land hired from tenant farmers under seasonal agreements.[4]

SUBSECTION (3).—*What Schedule Covers.*

145. So long as the farmer adheres to Schedule B it is his interest to bring all his operations within the assessment under that schedule on one year's rent. Assuming that he keeps to cultivation of the soil or to grazing, it matters not how intensive his cultivation is, nor how profitable; thus it was admitted from the Treasury bench that an Ayrshire farmer who in exceptional circumstances had sold his potato crop for £10,000 could not be taxed beyond the one year's rent. Further, the operations covered by Schedule B include, not only the production, but also the disposal, of the crop, whether wholesale or retail, and whether on the farm or at market, or by delivery to customers as by a milk round. The case of selling in a shop may be different.

SUBSECTION (4).—*What Schedule does not Cover.*

(i) *Cattle and Milk.*

146. There is a statutory rule [5] that if lands, charged under Schedule B, and occupied by a dealer in cattle or a dealer in or a seller of milk,

[1] *Inland Revenue* v. *William Ransom & Son, Ltd.* [1918] 2 K.B. 709.
[2] *Keir* v. *Gillespie*, 1920 S.C. 67; 7 Tax Cases 473.
[3] *Lean & Dickson* v. *Ball*, 1926 S.C. 15; 10 Tax Cases 341; *Jones* v. *Nuttall*, 1926, 42 T.L.R. 384; 10 Tax Cases 346.
[4] *Back* v. *Daniels*, [1925] 1 K.B. 526; 9 Tax Cases 183.
[5] Sched. D, Case III. rule 4,

are insufficient for the keep of the cattle brought on to the lands, so that the assessable value (rent) affords no just estimate of the profits, the Commissioners may require a statement of profits, and may charge such further sum as, together with the charge under Schedule B, shall make up the full profit. This rule has been very fully considered judicially.[1] Attention is drawn to the different language of the rule in relation to cattle and to milk—a dealer in cattle or a dealer in or seller of milk. As to cattle, the rule is limited to cases where cattle are brought on to the farm, but it is not doubtful that, if a farmer deals in live stock which never reaches his farm at all, he is then carrying on two businesses, the one being husbandry which is covered by the Schedule B assessment, and the other being that of a cattle dealer, which is not so covered, but is assessable as a trade under Case I. of Schedule D without any reference to the Schedule B assessment.

(ii) *Stallion Hiring.*

147. If the farmer owns a stallion which serves, not only his own mares, but also mares belonging to others, for which fees are received, he may be liable under Schedule D in addition to the Schedule B assessment.[2] It is a question of degree and may be a question of fact for the Commissioners. It does not matter whether the mares are brought to the farm or the stallion travels. The owner of a private stud may be charged under Schedule D on similar fees without any allowance for the expenses so far as applicable to his private stud purposes. It is a question of circumstances in such cases what proportion of expenses is deductible, including replacement of stallions and mares.[3]

(iii) *Grazings.*

148. A grazier renting grass parks is liable under Schedule D, while the owner of the parks is assessed under Schedule B as being in occupation. It matters not that the grazings are a kind of annexe to a farm on which the grazier is assessable under Schedule B; the grazings are a separate trade, the profits of which must be ascertained, as well as may be, for separate Schedule D assessment.[4]

(iv) *Special Cases.*

149. A garden attached to a house, not exceeding one acre, is not taxed on occupation, nor are land allotments.[5] Hop lands are taken under Schedule B, but nurseries and market-gardens are taken on the

[1] *Huxham* v. *Johnson*, 1926, 136 L.T. 410; 11 Tax Cases 266; *Stephenson* v. *Waller*, 1927, 44 T.L.R. 155.

[2] *Malcolm* v. *Lockhart*, 1919 S.C. (H.L.) 33; [1919] A.C. 463; 7 Tax Cases 99; *M'Laughlin* v. *Bailey*, [1920] I.R. 316.

[3] *Earl Derby* v. *Bassom*, 1926, 42 T.L.R. 380; 10 Tax Cases 357; *Marshall* v. *Tweedy*, 1927 S.C. 243.

[4] *Donald* v. *Inland Revenue*, 1922 S.C. 237.

[5] *Keir* v. *Gillespie*, 1920 S.C. 67; 7 Tax Cases 473.

rules of Schedule D, though formally the assessment is under Schedule B (1918 Act, Schedule B, 8).[1]

Subsection (5).—*Option under Schedule B.*

150. What is here called an option under Schedule B may more correctly be described as a rider upon that schedule. The farmer may either keep to the one year's rent basis, in which case he requires to produce no account, or he may, at the end of his farming year, produce an account and claim to have his assessment reduced to the profit therein brought out.[2] He will, of course, produce the account or not according as the profit which it shews is, or is not, less than one year's rent. Between those methods he may change about from year to year as pays him best; he requires to give no notice, but the claim to have the assessment reduced to the account figure must be made within one year of the end of the year of assessment. This option is available only to one who occupies land for husbandry "only," not "only or mainly." Even under the Schedule B rule, without any account, the farmer has the following rights, namely, to reduce the rent figure by (1) the annual value of cottages occupied by farm servants; (2) losses by flood or tempest, and even if the landlord's incapacity prevents any abatement being given, still for tax purposes an allowance is made of such a sum as equity suggests; [3] (3) rent abatements even voluntarily given for agricultural depression; (4) bank interest. He is not entitled (5) to any allowance for obsolescence or wear and tear. If, on the other hand, the farmer produces an account in which obsolescence and wear and tear may be charged, the position varies according to circumstances: (1) The accounts may shew a profit, but less than the rent basis; the farmer receives corresponding partial relief from, or repayment of, the farm tax. (2) The account may shew no profit; the farm tax is wholly cancelled or repaid. (3) The account may shew a loss; the farm tax is wholly cancelled or repaid, and if the farmer or his wife has any other income the farm loss is put against that other income, whether earned or investment, which accordingly is, to that extent, freed from taxation by cancellation or repayment.

Subsection (6).—*Option to elect Schedule D.*

151. It has already been pointed out that the right to be assessed under Schedule B is not limited to farmers but extends to all occupiers of land. The claim to relief in the case of losses caused by flood or tempest is equally widely applicable (Schedule B, rule 3). But the same cannot be said of the option now to be mentioned—the option to be assessed under Schedule D. That option is available to those who occupy land for husbandry "only" or woodlands managed on a

[1] *Lean & Dickson* v. *Ball*, 1926 S.C. 15; 10 Tax Cases 341; *Jones* v. *Nuttall*, 1926, 42 T.L.R. 384; 10 Tax Cases 346.

[2] Sched. B, rule 6.

[3] *Ibid.*, rule 3.

commercial basis and with a view to profit.[1] The farmer, that is a person occupying land for the purpose of husbandry "only," is entitled in his option to elect to be assessed for any tax year under Schedule D. To that end he must give notice to the inspector of taxes before 5th August (in England, before 5th June) in the year of assessment.[2] The basis of assessment for that year then has no relation to the rent or annual value, but is the profit, ascertained in terms of the Income Tax Acts, of the farm for the year preceding the year of assessment. For 1928–29 that does not necessarily mean the profit of the year ending on 5th April 1928; it may be the profit as shewn by an account for the farmer's ordinary accounting year, closing within the year preceding the year of assessment, *e.g.* an account for the year ending Martinmas 1927 would be the basis of Schedule D assessment for the tax year 1928–29.[3] This election between Schedule B and Schedule D is on each occasion made for one year only, and it is the farmer's right, without reason assigned, to choose whichever be pleases for each year, and to change back and forward as much as he pleases. Schedule B applies automatically if Schedule D be not timeously claimed for any year. The results of Schedule B having been stated above, it is useful to state here the results of Schedule D by way of comparison. Assume Schedule D to have been chosen, and that the statutory profit (last year's actual) is £1000, and assume further that at the close of the year an account shews: (1) Actual profit £1500; the extra £500 is not taxable. (2) Actual profit less than £1000, say £500; no relief is given from, or repayment of, tax on any part of the £1000, but, of course, subject to earned income and personal allowances. (3) No profit; there is no relief or repayment. (4) A loss; the tax is payable, but a refund is obtainable equal to tax on the loss. So far as the loss is not met in this way or by repayment of tax on other income, the loss can be carried forward for six years; but if for any of those years the assessment is under Schedule B, there can be no debit of any part of that loss in that year or in any later year.[4]

Subsection (7).—*Farm Account.*

152. So far as income tax is concerned it is in a sense correct to say that, if the farmer keeps to Schedule B always, he can never be called upon by the Department to produce an account. But even then he deprives himself of the right stated above,[5] namely, the right to claim abatement of, or exemption from, tax in those cases where an account would shew a profit less than one year's rent, or no profit, or a loss. As to Schedule D, the farmer cannot claim assessment under that schedule unless he can produce an account for the preceding year. The demands of the Department in the matter of accounts are not exacting. An official form of account, No. 79 D, is supplied; it is intended for cases

[1] Sched. B, rule 7.
[2] *Ibid.*, rule 5.
[3] Finance Act, 1926, s. 34.
[4] *Ibid.*, s. 33.
[5] See para. 150, *supra.*

where full and proper accounts in an accountant's sense have not been kept, but only some form of cash account of receipts and outgoings. The consequence is that figures have to be inserted for farm debts due to and by the farmer both at the beginning and also at the end of the year to which the account relates. A credit requires to be brought into the account for farm produce consumed by the household; if that extends to consumption by employees, then to that extent it must be cross entered on the other side as wages in kind. In the case of a farmer-owner the treatment of rent, repairs, rates, etc., is special; there is an option to debit either (1) the gross Schedule A figure, excluding the house, in which case the following are not debited—(*a*) land tax, (*b*) owner's rates, (*c*) landlord's repairs; or (2) the net Schedule A assessment (excluding the house) and also the above items (*a*), (*b*), and (*c*). Occupier's rates and occupier's repairs are always deductions, except that in the case of an occupying owner no repairs or rates on the house are allowable. Wages, both cash and in kind, are chargeable, except cottages included in the rent item; so also are wages to sons and daughters, whether in cash or in kind, and up to £54 to the wife if she assists at all; but the payments must be put through the account. The advantage of this will be seen later.[1]

Section 10.—Schedule C.

153. This is a schedule of which the public hear little, or not at all. It applies to all payments, except salaries, made out of "any public revenue," that is, whether revenue of the United Kingdom or of a British dominion, or of any foreign State. The schedule speaks of payments out of "any public revenue in the United Kingdom or elsewhere," and directs that the tax "shall be paid by the persons . . . entrusted with payment [of the interest, etc., in respect of which the tax is chargeable] on behalf of the persons entitled thereto." In other words, the Bank of England or other paying agency shall pay less tax and shall hand over to the Exchequer the tax thus deducted. Schedule C covers a large amount of income which is not United Kingdom income, though it happens to have been paid in this country, *e.g.* interest on Dominion and Foreign Government loans, the interest on which is by the terms of issue payable in this country. That does not make the interest assessable income in the case of persons not resident in the United Kingdom, whether they be British subjects or not, or domiciled in the United Kingdom or not.[2] This is a head on which a large amount of tax is borne by people who are not aware of their right to exemption in that respect. It is not a case of tax allowance or relief on assessable income, but fundamental non-liability, because, in the case of the persons in question, the interest is not assessable income.

154. The directions in Schedule C are: "The interest or dividends on any securities of a foreign State or a British possession which are

[1] See Section 24, *infra*.

[2] Sched. C, General Rules, 1 (*d*).

payable in the United Kingdom, where . . . the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom. . . . Provided that where the securities of a foreign State or British possession are held under any trust, and the person who is the beneficiary in possession under the trust is the sole beneficiary in possession and can, by means either of the revocation of the trust or of the exercise of any powers under the trust, call upon the trustees at any time to transfer the securities to him absolutely free from any trust, that person shall, for the purposes of this provision, be deemed to be the person owning the securities." This rule was considered in the House of Lords very recently in cases which are referred to below.[1]

Section 11.—Schedule D, Cases I. and II.

Subsection (1).—*General Scope of Charge.*

155. Schedule D[2] is concerned with "annual profits or gains arising or accruing," *inter alia* (1) to any person residing[3] in the United Kingdom from any trade or profession, whether carried on in the United Kingdom or elsewhere; and (2) to any person, whether a British subject or not, although not resident[3] in the United Kingdom, from any trade or profession exercised within[4] the United Kingdom. Those are the matters dealt with under Cases I. and II. of the schedule—Case I. being trade, and Case II. professions. There is a mass of case law on the questions What is a trade? and What is the effect of "annual" in Rule 1 of the General Rules of Schedule D? It may be admitted that it is difficult to say what, if any, is the effect of that word. Negatively it has been laid down that it does not mean "bearing fruit in successive years."[5] Affirmatively it has been said that "annual" means income not capital,[6] or simply occurring in the year of assessment.[5] But at any rate, in order to be taxable, there must be a trading profit: it is not enough that there is a book entry valuing up stock on the occasion of a sale of the business.[7] As to what is or is not a trade, it seems sufficient for the present purpose, and especially for Scottish lawyers, to deal with two of the latest cases—*Martin*[5] in England, and *Livingston*[8] in Scotland.

Subsection (2).—*Annual Profit.*

156. The English case of *Martin* v. *Lowry*[5] is important for what is contained in the judgments, but as to the particular case it would appear that it was taken through all the Courts on account of the huge amount at stake; the whole chain of decisions was in favour of the

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[1] See Section 17, *infra*.
[2] Sched. D, rule 1.
[3] See para. 238 *et seq.*
[4] See para. 161, *infra*.
[5] *Martin* v. *Lowry*, [1926] 1 K.B. 550, affd. [1927] A.C. 312; 11 Tax Cases 297.
[6] *Scottish Provident Institution* v. *Farmer*, 1912 S.C. 452; 6 Tax Cases 34; *Reed* v. *Seymour*, [1926] 1 K.B. 588.
[7] *Doughty* v. *Commissioners of Taxes*, [1927] A.C. 327.
[8] *Inland Revenue* v. *Livingston*, 1927 S.C. 251.

Crown. It related to a profit of fully one and a half millions sterling on the resale in lots of forty-five million yards of Government aircraft linen. That kind of business or transaction was not within the line of the appellant's ordinary occupation, which was that of an agricultural machinery merchant. The material was bought in one lot; he was bound to take delivery within six months, and the resale was completed within a year. On these facts the appellant maintained (1) that there was no trade, but only a single adventure; and (2) that in any event the profit was not annual profit. On the other hand, there were the following adverse facts: The appellant set up a large and skilled selling organisation, including an office and staff, in London for eight or nine months; the reselling was in lots, partly to wholesale houses and partly to retailers, the purchasers numbering over 1000. The liability to taxation was throughout regarded as clear. The law lords were clear that profit may be "annual" though the operations are begun and ended within the one tax year. It was regarded as relevant that income tax itself is imposed for one year only, and the Lord Chancellor quoted with approval the *dictum* of Rowlatt J. in a previous case [1] that the word "annual" is satisfied if the profit is "profits or gains in any one year or in any year as the succession of years comes round."

Subsection (3).—*Isolated Transaction.*

157. But, equally, an important aspect of *Martin* v. *Lowry* is that in the House of Lords opinions were expressed somewhat severely restraining the *obiter* observations of Rowlatt J. in the earlier case,[1] and distinctly restoring the importance of the plea of exemption for proper isolated transactions. Lord Sumner said that "the whole subject [isolated transaction] is a difficult one, and as I hope sometime, and perhaps before long, your Lordships may have the opportunity of considering it in full detail, I make no further observation about it except that I should wish to reserve my judgment very fully on every aspect of it." Lord Carson went further. Speaking of the earlier case [1] his Lordship said: "The learned judge introduced instances where he thought income tax would be payable, where there was in reality no trade being carried on, and where it could hardly be alleged that trade was being carried on, they being isolated transactions."

158. In the case of *Livingston* [2] there was the specialty that three men joined forces in order to carry through a certain operation. The operation was the purchase of a cargo steamer, her conversion to a steam-drifter, and resale. They had not previously been associated in business. None of them had previously bought a ship. One of them was a ship-repairer and another a blacksmith, and these two worked personally on the job for wages. The rest of the work was done by contract. The conversion took four months and cost about £1340 as

[1] *Ryall* v. *Hoare*, [1923] 2 K.B. 447. [2] 1927 S.C. 251.

compared with the original purchase price of £1120 and sale price of £3425. The decision of the First Division was in favour of the Crown. It was given after the House of Lords judgment in *Martin* v. *Lowry*, and is valuable both for its direct effect and for important *obiter dicta* on the matter of isolated transactions. The decisive element was the conversion operation. The Lord President referred to the money laid out on the thing purchased "for the purpose of making it marketable at a profit; this seems to me of the very essence of trade." Lord Sands further emphasised that the work was conversion, not merely cleaning (as a picture) or repainting (as a ship). His Lordship laid no weight either way on the fact that two of the parties worked at the job on the lines of their regular employment. Lord Blackburn regarded that as of critical importance in favour of the Crown. The Court accepted the contention that it was a case of isolated transaction, but held that the facts of the case negatived the plea for exemption on that ground.

159. The following *dicta* were pronounced on the subject of that exemption. The Lord President said: "If the venture were one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale, it might be impossible to say that the venture was 'in the nature of trade,' because the only trade . . . would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade as the appearance of a single swallow does of making a summer." Lord Sands said: "According to understanding, practice, and I think authority, . . . the profit of an isolated transaction by way of purchase and resale at a profit, not within the ambit or trade of the party making the profit, is not assessable . . . as profits or gains . . . from trade." Lord Blackburn said: "It is well settled that an isolated trading transaction of a single character outside a man's ordinary business does not amount to the carrying on of a trade . . . so as to render the profits of the transaction liable to taxation." His Lordship was clear that the admission of joint adventure did not advance the Crown's case. "I entertain no doubt that an isolated [joint] adventure is no more the 'carrying on' of a trade than is an isolated act of trading."

160. The importance of those *dicta* is obvious. They are not here discussed, but it may be noted that the performance of work on an article of commerce to reconstruct it, and still more to manufacture it, is regarded as of critical importance towards inferring tax liability. That suggests the case where the article itself is brought into first existence by the brain work of the individual, as in the case of literary work, and yet it is understood that an isolated effort of that nature is not in practice assessed. If that is correct, the distinction may be that it is not regarded as a case of trade at all. Even so, if the remuneration took the form of royalties it is thought that these must be assessable income, as would also be the case if the income were derived from a capital price received for the copyright.

SUBSECTION (4).—*Trading by Non-Residents.*

(i) *Trading "in" or "with" this Country.*

161. There is no enactment which makes any person not resident in this country liable to income tax on business done by him "with" this country as distinguished from business done "in" this country. The facts in the various cases which occur, however, are often such as to create great difficulties in applying the distinction. The chief matters for consideration in such cases are: (1) What trade premises, or organisation, or representation there are in this country; (2) the powers of any representative in this country; (3) the terms of circulars, trade lists, and other advertisements; (4) how and (most important of all [1]) where the contracts are made; (5) the place of delivery; [2] (6) whether goods are consigned f.o.b. or c.i.f.; [3] (7) the place of payment.

162. The two latest leading cases in Scotland are *Crookston* [4] and *Macpherson*,[5] neither of which went to the House of Lords. In *Crookston* a French company had agents in Scotland with extensive powers, including power to make contracts at or over minimum prices fixed by the company, to sign contracts in Glasgow for the company, to endorse the bills of lading, to receive prices paid, and to give receipts. In that case the decision was against the Crown; but it has been questioned,[6] and it is suggested that it is not consistent with *Macpherson*. In the latter case Scottish agents made contracts after offers were approved by the foreign principals; the goods were consigned to the agents and then invoiced by them, and they received payment. The decision was in favour of the Crown. *Per contra*, no matter where contracts are made, if the work of the contract is performed in this country, that is carrying on a trade in this country, and there is liability.[7]

(ii) *Arrangements between Residents and Non-Residents.*

163. Rule 7 [8] of the General Rules under the Income Tax Act, 1918, attempts to provide machinery for counteracting schemes by which a non-resident shall obtain the substantial results of carrying on trade in this country without putting himself in that position legally, and therefore without incurring liability for tax. The non-resident's method is to set up someone in this country as a professed principal and to sell to him for the British market, thus purporting to trade "with" and not "in" this country. In Rule 7 it is provided that if it appears that,

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[1] *Maclaine & Co.* v. *Eccott*, [1926] A.C. 424; 10 Tax Cases 481; *Muller & Co.* v. *Lethem*, [1927] 1 K.B. 780.

[2] *Turner, Ltd.* v. *Rickman*, 1898, 4 Tax Cases 25.

[3] *Nielsen, Andersen & Co.* v. *Collins*, 1926, 42 T.L.R. 704.

[4] *Crookston Bros.* v. *Inland Revenue*, 1911 S.C. 217.

[5] *Macpherson* v. *Moore*, 1912 S.C. 1315.

[6] *Wilcock* v. *Pinto*, [1924] 1 K.B. 304; 9 Tax Cases 111; *Maclaine & Co.* v. *Eccott*, *supra*.

[7] *Muller & Co.* v. *Lethem*, *supra*.

[8] *Gillette Safety Razor Co.* v. *Inland Revenue*, [1920] 3 K.B. 358.

owing to the close connection between the two and to the control exercised by the foreigner, business is so arranged that it provides no profit or less than the ordinary profit for the resident party, the latter shall be treated as an agent and not as a principal, with the result that the foreigner is then trading "in" this country and is therefore assessable on the whole profit of the trade, with the benefit of any limitation of liability obtainable under General Rule 12.[1]

(iii) *Resident Agents not in Receipt of Money.*

164. There are provisions for assessing non-resident persons through regular authorised agents in this country even though the agents have not the receipt of money.[2] But no such assessment can be made on a broker or general commission agent,[3] even though he regularly acts for the non-resident party.[4] A shipbroker is not a broker.[5] Rule 6 of the General Rules in the Income Tax Act, 1918 (re-enacting s. 31 of the Finance (No. 2) Act, 1915), provides that a non-resident person shall be assessable on profits arising directly or indirectly through or from any agency. It has been maintained that this may impose tax on non-residents on trading not "in" this country; but that contention has been rejected,[6] leaving the effect of the rule extremely doubtful.

165. A further qualification in favour of non-resident traders is found in All Schedules Rule No. 11. The rule provides: "The fact that a non-resident person executes sales or carries out transactions with other non-residents in circumstances which would make him chargeable in pursuance of these rules in name of a resident person shall not of itself make him chargeable in respect of profits arising from those sales or transactions." This is almost as obscure as Rule 6.[7] It has been considered in the cases noted.[8] The construction judicially suggested is that the rule applies even though the actual contracts of sale are made in this country by regular agents, but that it does not remove any otherwise existing liability, and that it means only that even a regular agent cannot be assessed, if he has not the receipt of money, where both the principals are non-resident.

(iv) *Partnerships controlled Abroad.*

166. In partnership cases if the "control and management . . . is (*sic*) situate abroad," the business is deemed to be carried on by persons resident abroad, notwithstanding that some of the partners reside in this country and that some of the operations are in this country.[9] As

[1] See para. 166, *infra*.
[2] All Schedules rule 5.
[3] *Ibid.*, rule 10.
[4] Finance Act, 1925, s. 17.
[5] *Nielsen, Andersen & Co.* v. *Collins*, 1926, 42 T.L.R. 704.
[6] *Greenwood* v. *F. L. Smidth & Co.*, [1922] 1 A.C. 417; 8 Tax Cases 193.
[7] See preceding para.
[8] *Maclaine & Co.* v. *Eccott*, [1926] A.C. 424; 10 Tax Cases 481; *Muller & Co.* v. *Lethem*, [1927] 1 K.B. 780.
[9] Sched. D, Cases I. and II. rule 12.

regards the operations in this country, the firm is chargeable on the profits of these "to the same extent as and not further than" a person resident abroad is chargeable on profits of trading here, although one or more of the partners are resident here.[1]

SUBSECTION (5).—*Deductions not permitted in Arriving at Profits.*

167. The Income Tax Acts contain practically no directions as to admissible deductions. There is a declaration that there shall be no deductions except such as are authorised by the Acts,[2] and the rule then proceeds to detail, not deductions which are to be admissible, but that certain deductions shall not be allowed.[3] Those prohibited deductions are noted in the following paragraphs.

(i) *Expenses.*

168. *Any disbursements for expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, etc.* This general prohibition is developed below.[4]

(ii) *Domestic or Personal Expenditure.*

169. *Any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade, profession, etc.* These are disallowed on the ground that such expenditure is not an expense of earning the profit or income, but one of the ways in which the trader or professional man expends his profits or income. The rule has particular application in the case of farmers, shopkeepers, hotelkeepers, and boarding-schools. Many farmers' households are largely maintained off the farm products, and the cost of these must be added to the receipts' side of the farming account. The same holds in the case of shopkeepers as regards stock sent from the shop to the house for domestic consumption; that must be brought into account at cost. The case of *contra* accounts must also be dealt with; that is, where stock from the shop is not sold for cash, but bartered for other goods or for services supplied or rendered to the shopkeeper's household. In the case of hotels and boarding-schools there must be deducted from food supplies and other items so much as is for the use of the taxpayer and his family.

(iii) *Rent of Dwelling-House.*

170. *The rent or annual value of any dwelling-house or domestic offices or any part thereof, except such part thereof as is used for the trade or profession.* It will be observed that this prohibition is levelled at premises

[1] Sched. D, Cases I. and II. rule 12.
[2] *Ibid.*, rule 1 (1); Income Tax Act, 1918, s. 209.
[3] Sched. D, Cases I. and II. rule 3.
[4] See para. 186 *et seq.*, *infra.*

which are mainly or at least partly used for "dwelling," and the exception is to the extent to which a business use is conjoined. It is one of the peculiarities of the income tax code that there is nowhere any plain statement that the rent or annual value of business premises is a deduction in arriving at profits, but it has been judicially recognised that this is pre-eminently a business expense, and the item is passed as matter of course.[1] If the trader has paid a premium for the lease, it will probably happen that the Schedule A assessment exceeds the rent; in that case he is entitled to deduct the latter,[2] and this is a point which is often missed. It was mentioned by Lord Sands in the case cited, but there it happened that it did not avail.[3] Where it is a case of a part business use of a dwelling-house, the proportion to be allowed is to be fixed by the Commissioners. There was a limitation to two-thirds of the total, but it was recognised that that sometimes operated unfairly, and there is now no limitation. A good instance is that of a doctor residing and practising in an expensive neighbourhood purely for the sake of the practice. It may be that the part of the house actually used for professional purposes does not exceed one-third, in space or value, of the whole, but for the other reason indicated it may be fair that three-fourths of the total rent or annual value should be charged against the practice. This shews that it may not be at all a fair standard to look only to the proportions of the premises used for professional and domestic purposes respectively. As pertinents of the business use of the house the following are also taken in: Rates, light, heat, service, repairs. It is suggested that there are many cases in which a claim could be, but is not, made under this head. Many professional and business men do a good deal of business work at home, even when the business premises and the house are separate and apart. In some of those cases the house is avowedly treated as a second or branch office, and in that class of case it may be assumed that there are debited to profits the whole of the principal office rent and other items, and also a proper proportion of rent and other items of the house as used for a branch office. But there is another class of case in which there is only the one office but much "home work" is done; in those cases it is not obvious why a proportion of house rent and other items should not be brought into the account.

(iv) *Losses.*

171. *Any loss not connected with, or arising out of, the trade, profession, etc.*[4] It will be observed that this is a negative rule, and it does not follow that any loss connected with the trade is a proper deduction. "Connected with" is wider than "arising out of," and it will be seen below that certainly the taxpayer is not entitled to deduct every loss connected with his trade.

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[1] *Inland Revenue* v. *Scottish Central Electric Power Co.*, 1928 S.C. 260, per the Lord President.

[2] *Gillatt & Watts* v. *Colquhoun*, 1884, 33 W.R. 258; 2 Tax Cases 76.

[3] *Inland Revenue* v. *Strump*, 1925 S.C. 599.

[4] See para. 199 *et seq.*, *infra*.

(v) *Capital and Interest thereon.*

172. *Any capital withdrawn from, or any sum employed or intended to be employed, in such trade, profession, etc. Any interest which might have been made if any such sums as aforesaid had been laid out at interest.* The official instructions in like manner debar any deductions for interest on the trader's capital in the business. These paragraphs are naturally taken together. The reason for the non-deduction of interest on capital is obvious, for even if that deduction were allowed, the interest in question would still be assessable income, and the only difference would be that it would be investment income, and to that extent the earned income relief would be lost. The Department makes no attempt to tax interest on capital in that special way as distinct from the trade profit. The matter was discussed before the last Royal Commission on income tax, and the official evidence was that the work would be so heavy as to make it not worth while.

(vi) *Improvement of Premises.*

173. *Any capital employed in improvement of premises occupied for the purposes of the trade, profession, etc.* It will be observed that this says nothing about repairs or renewals, and those are allowed ;[1] but all through accounts the Department draws as strict a line as is possible between, on the one hand, repairs, which may always pass, and renewals, which may pass, except when wear and tear are claimed, and, on the other hand, improvements and extensions which are excluded as being additional capital operations.

(vii) *Bad and Doubtful Debts.*

174. *Any debts except bad debts proved to be such to the satisfaction of the Commissioners, and doubtful debts to the extent to which they are respectively estimated to be bad.* When the account is on the "cash basis"[2] this matter does not arise, for then no earnings are credited unless they have been actually collected. The Department will not allow any general or overhead allowance for expected loss on debts. Their practice is to require that individual debts shall be specifically dealt with, and if too much or too little has been allowed, the matter can be put right in the following year. Nevertheless it is understood that in certain trades, where the debts are small, numerous, and uncertain, the Department does sometimes sanction the basis of a percentage allowance. The statutory rule proceeds that, *in the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be its value.* It is not, however, understood that this means either that the taxpayer will be held to this estimate if it should turn out to be too large, or that he escapes bringing into a future year's account any excess recovery.

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[1] Sched. D, Cases I. and II. rule 3 (*d*).

[2] See para. 206, *infra*.

175. A specialty arises regarding interest on book debts : A debt may have been brought into account at its face value, then it becomes doubtful and an arrangement is made for payment by instalments with interest. As between debtor and creditor the account is kept on the basis of applying each instalment, in the first place, to interest to that date, which is the proper accounting as between them. But it does not seem to follow that the trader has any duty to pay tax on the interest so stated in account so long as it remains uncertain whether his total recoveries will amount to the face value of the debt even if no interest at all had been suggested, and in practice this view has been officially acquiesced in. If book debts have been insured the position apparently is that if the premiums have been allowed to be, and have been, debited in the account, any sum recovered from the insurance company will require to be credited; but otherwise not.

176. It frequently becomes a question whether an asset is a debt in the sense of the rule or is an investment, also whether it is a debt in the trade. Loans by brewers and distillers on tied houses are so common that it has been held that losses on those loans may be debited to profits on the footing that liquor production and money-lending in that sense are ancillary trades or two departments of one trade.[1] But the following have been disallowed: Loss on share-holding in an allied company;[2] loss on shares in companies taken by an architect in order to get their work;[3] loss sustained by a company through the insolvency of the manager who held the controlling interest,[4] or to whom advances on account of unearned commission had been made to a very large amount.[5]

(viii) *Recoverable Sums.*

177. *Any sum recoverable under an insurance or contract of indemnity.* What is meant is that there shall be no debit of any loss against which the trader is entitled to indemnity under an insurance or other contract. *E.g.*, loss of stock by fire shall not be debited except so far as uninsured. Where stock had been insured at replacement value, and the underwriters had settled on that footing, it was held that the trader was bound to bring into trading account the whole sum received under the policies, though that was greatly in excess of the cost figures at which the stock had stood in the books and accounts for a number of years with the knowledge and approval of the Department.[6] In that case the premiums on the full replacement value had always been debited in the accounts. A trader is not bound to insure, and it may be that the rule now being dealt with is limited to insurances the premiums on which

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[1] *Reid's Brewery Co.* v. *Male*, [1891] 2 Q.B. 1 ; 3 Tax Cases 279.

[2] *English Crown Spelter Co.* v. *Baker*, 1908, 99 L.T. 353 ; 5 Tax Cases 327 ; *Jacobs, Young & Co.* v. *Harris*, 1926, 11 Tax Cases 221.

[3] *Stott* v. *Hoddinott*, 1916, 7 Tax Cases 85.

[4] *Curtis* v. *Oldfield*, 1925, 133 L.T. 229 ; 9 Tax Cases 319.

[5] *Roebank Printing Co.* v. *Inland Revenue*, 1928 S.C. 701.

[6] *Green* v. *J. Gliksten, Ltd.*, [1928] 2 K.B. 193.

have been debited in account. At any rate the Department pass premiums for loss of profits and strike insurances only if the trader gives an undertaking to bring into account any sums which may be recovered under such insurances. Many traders prefer, and some are advised, not to give that undertaking, and accordingly not to debit the premiums, their idea being that, if such losses occurred, they would be chargeable to profit and loss, which is no doubt correct; and that if the premiums have been kept out of account, the insurance recoveries could be kept out also, and that view is supported by the Department's attitude.

(ix) *Annual Payments.*

178. *Any annual interest or any annuity or other annual payment payable out of the profits or gains.* This prohibition is of a totally different nature from those which have preceded. The others relate to sums which may or may not be deducted from earnings before profits are ascertained; this relates to payments made out of the profits when they are ascertained. The reason why these are not to be deducted from assessable profits is that on payment the trader is entitled to deduct the tax from the payee; in doing so he is the agent of the Department to collect that part of the tax, and he pays it over to the Department by paying tax on the profits without deducting those payments of annuities, etc. Further, he receives no allowances on that part of the profit, and properly not, for it is not his part or his income, but that of the annuitant, and on that part of the income he is taxed at the full standard rate, being the rate at which he deducts tax on paying to the annuitant. This leaves the annuitant to keep himself right by a claim for repayment to be sent in to the Department.

(x) *Royalties.*

179. *Any royalty or other sum paid in respect of the user of a patent.* Those payments are not out of profits but before profits are ascertained; otherwise the position is the same as stated under the preceding item.

(xi) *Income Tax.*

180. No deduction is allowed for British income tax. That tax is not a trade or professional deduction before arriving at the profits. On the contrary, it is clearly a payment out of the profits, and calculated with reference to the amount of the profits. It has been correctly described as the King's share of the profits. Even in technical treatises this has been questioned, but the principle is in general application in other similar directions; thus estate duty is paid on the estate ascertained before deduction of the duty; legacy duty on a legacy of £100 to a stranger is £10, not £9, though the legatee receives net only £90;[1] and whether a letter is correctly stamped is determined by the weight

[1] Cf. *Colville* v. *Inland Revenue*, 1923 S.C. 423.

of the letter with the stamps affixed. The prohibition applies to tax paid in British Dominions, including the Irish Free State, protectorates, and mandated territories, unless under the law of the Dominion no provision is made for relief from that tax in respect of payment of British tax. But tax paid in foreign countries is deductible; and where an employer pays the tax chargeable on an employee's salary, the additional payment thus made by the former is extra salary paid out, and so it is a deduction in arriving at the employer's profits; but the counterpart is that the employee is taxed on this additional remuneration.

SUBSECTION (6).—*Permitted Deductions.*

(i) *Repairs and Replacements.*

181. Officially published forms supply what is lacking in the Acts, namely, a list of deductions which are allowable in arriving at profits. These include the items mentioned in this and the four succeeding paragraphs. The first item allowable is: *Sums expended for repairs of premises occupied for the purpose of the trade, etc., or for the supply or repair of implements, utensils, or articles employed.* It will be observed that what are here referred to are repairs, not improvements or extensions; and as to the implements, etc., while repairs are always chargeable, whether or not a claim is made for wear and tear, the "supply" of these here means renewal, and the paragraph has reference only to lighter tools where wear and tear is not allowed, or where the claim is not made. If it were a case of original provision of tools, that would be a capital item; and where wear and tear is claimed, renewals cannot also be passed.

(ii) *Annual Value of Premises.*

182. *The annual value of any premises within Great Britain or Northern Ireland used solely for business.* The annual value for this purpose is the net Schedule A assessment as reduced by the statutory allowance for rates and repairs,[1] except in the case of mills, factories, and like premises,[2] where the gross assessment is deducted.

(iii) *Irish Free State Tax.*

183. *The amount charged to British income tax on lands or other premises in the Irish Free State, so far as the premises are used for the purpose of the business.*

(iv) *Dominion and Foreign Premises.*

184. *One-sixth of the annual value of mills, factories, or like premises out of Great Britain and Northern Ireland occupied by the owner for the purpose of the trade.* With reference to the items in this and the preceding paragraph it will be observed (*a*) that there is no right to deduct the annual

[1] Para. 131, *supra*; Sched. D, Cases I. and II. rule 5 (*r*).
[2] *Inland Revenue* v. *Scottish Central Electric Power Co.*, 1928 S.C. 260.

value of business premises outside the British Isles; that is because the British Exchequer does not obtain tax on the annual value of those premises; (*b*) that the right to deduct the annual value of business premises in the Irish Free State is limited to the figure, if any, on which British income tax is obtained; but (*c*) that in the case of mills, factories, and other premises, no matter in what part of the world situated, there is right to deduct one-sixth of the annual value; this is allowed as an exceptional concession for the wasting nature of the property owing to the injury to the structure by the vibration from the machinery-working.

(v) *Obsolescence.*[1]

185. There may be deducted such expenditure on replacement of obsolete plant or machinery as is equal to the original cost to the trader of the plant or machinery replaced, less (*a*) all wear and tear allowances which have been obtained against the original cost of the obsolete machinery, etc., that is to say, it is the officially written-down value that is brought into computation; and (*b*) salvage. Obsolescence differs from wear and tear inasmuch as the latter has reference only to physical deterioration from age and use, whereas obsolescence may apply to a new and scarcely used machine if it is thrown out of date by better machines coming on the market.

Subsection (7).—*Application of the Deduction Rules.*

(i) *Generally.*

186. In the application of the rules stated above endless questions arise, the chief difficulties being whether particular items are capital or income expenditure, and, if the latter, whether the money has been "wholly and exclusively laid out or expended for the purposes of the trade, profession," etc. In both respects many of the cases are on the border line, and having regard to the infinite variety of circumstances arising in trade and commerce, it must necessarily be so. One general observation is that questions of these kinds may be materially affected by the nature and form of findings by the Special or General Commissioners, as appeals to the Courts are competent on questions of law only. Whether in a particular case a certain item is to be regarded as capital expenditure or as a trade outgoing is not usually a question of law nor one specially adapted for determination by a law Court. There is the authority of Lord Dunedin when Lord President that it is not a question which can be weighed in very fine or exact scales; all that his Lordship could say was that in a rough way it was not a bad criterion to say that capital expenditure was a thing that was to be spent once for all, and income expenditure was a thing which was going to recur every year.[2] The same case disposed of a departmental contention

[1] Sched. D, Cases I. and II. rule 7; Finance Act, 1925, s. 16.

[2] *Vallambrosa Rubber Co.* v. *Farmer*, 1910 S.C. 519; 5 Tax Cases 529.

that no expenditure can be deducted unless it has reference to a profit in the year in which the expenditure is made, which Lord Dunedin rejected as manifestly absurd; this had reference to expenditure on weeding and similar work on a rubber plantation in the early years before trees were ready for tapping.

(ii) *Examples of Items Allowed.*

187. The practice varies from time to time and in different districts; the distinctions taken are very fine, as has been judicially admitted; and all that can be done here is to give a few illustrations. The fact that it is not required that the expense shall have been necessarily incurred indicates, and it is the case, that the Department makes no claim to dictate how the trader or professional man shall carry on his business. It may well be that less expensive offices would serve, and a highly paid assistant could be dispensed with if the principal chose to work harder himself; but these are matters with which the Department has no concern. The following items are allowed: (1) Taxes and rates, not income tax, and therefore any repayment of income tax which may be obtained will not be credited in the account; (2) cost of travelling in (not to or from) business, including journeys between multiple-shops; (3) insurances, but only of an ordinary kind, such as fire, glass, burglary, fidelity, national health, unemployment, workmen's compensation, against loss of licence of tied houses; (4) uninsured losses of stock and utensils, but not of buildings or plant, by fire; (5) uninsured losses by employer's liability claims, burglary, dishonesty; but where the general manager and controller of a business embezzled a large sum of realised profit, no deduction was allowed; [1] the same would no doubt hold in the case of a defaulting partner; (6) expenses of removal of stock to new premises, and all expense of compulsory removal; [2] (7) damages, and incidental costs, in connection with the business; the merits or demerits of the case, and whether lost or won, do not matter; but sometimes these items are disallowed and the line is very fine. An hotelkeeper was not allowed to deduct damages and costs in connection with liability to a trade agent injured by a chimney blown down on him by a gale while he was in bed in the hotel; [3] (8) entrance fees, subscriptions, and levies paid to trade associations.[4] On the other hand, receipts from the association by a member are to be brought into his account, but not loans, nor capital receipts, nor surplus on winding-up. The association itself becomes taxable on profit, if any. The conditions are laid down in a memorandum which is available; (9) contributions to conciliation boards; [5] (10) accustomed payments for public

[1] *Curtis* v. *Oldfield, Ltd.*, 1925, 133 L.T. 229; 9 Tax Cases 319.
[2] Cf. *Granite Supply Association* v. *Kitton*, 1905, 8 F. 55; 5 Tax Cases 168.
[3] *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448.
[4] *Adam Steamship Co., Ltd.* v. *Matheson*, 1921 S.C. 141; *Grahamston Iron Co.* v. *Crawford*, 1915 S.C. 536; 7 Tax Cases 25; *Thomas* v. *R. Evans, Ltd.*, [1927] 1 K.B. 33.
[5] *Lochgelly Iron and Coal Co.* v. *Crawford*, 1913 S.C. 810; 6 Tax Cases 267.

or charitable purposes from which members of the staff might obtain benefit, *e.g.* continuation classes, technical courses, and local hospitals. Liberal contributions to hospitals are passed if applied to revenue purposes and not for capital outlays or extensions; (11) reasonable advertisement; but on starting a business, or making an extension, part at least may be disallowed as capital expenditure; (12) subscription to automobile association; (13) accustomed gratuities to retiring servants and lump sums for purchase of annuities for their benefit; [1] (14) expense of stocktaking; (15) expense of keeping down vermin; (16) part of hire purchase payments, so far as fairly applicable to the fair use of the articles as distinguished from instalment of purchase price.[2]

(iii) *Examples of Items Disallowed.*

188. The following are examples of items disallowed: (1) Premiums on insurances intended to replace capital, *e.g.* a sinking fund policy [3] to compensate for exhaustion of minerals or the expiry of a lease, also profits' insurance and insurance against strikes, but the last two will be allowed if the taxpayer undertakes to treat as income any sums which may be recovered under the insurances; (2) cost of travelling to and from business; [4] (3) penal liabilities though arising out of the carrying on of the business, *e.g.* fines and relative costs for breach of legal regulations; [5] thus it may happen that a bookmaker is assessed on the profits of illegal betting,[6] without being allowed to deduct fines and expenses of defence; but it is otherwise regarding payments exacted under domestic rules of the trade itself for an act forbidden by these rules but in itself legal, *e.g.* selling books or cars below the trade limit; (4) premiums paid on renewal of leases; [7] casualties; [8] (5) cost of borrowing money, whether original borrowing, or renewals, or replacements.[9] An exception is made in favour of mortgage and investment companies, and then only for renewals and replacements. It has been suggested that another exception is that of speculative builders, and even as regards original borrowing; (6) loss on investments taken to secure business; [10] but if the business remuneration itself is taken in shares or debentures, these need not be reckoned at par if worth less, and a reasonable time is allowed for realisation; (7) loss on financing of

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[1] *Smith* v. *Incorporated Council of Law Reporting*, [1914] 3 K.B. 674; 6 Tax Cases 477; *Hancock* v. *General Reversionary Investment Co.*, [1919] 1 K.B. 25; *Mitchell* v. *Noble*, [1927] 1 K.B. 719; 11 Tax Cases 372.

[2] *Darngavil Coal Co., Ltd.* v. *Francis*, 1913 S.C. 602; 7 Tax Cases 1.

[3] *City of Dublin Steam Packet Co.* v. *O'Brien*, 1912, 6 Tax Cases 101.

[4] *Ricketts* v. *Colquhoun*, [1925] 1 K.B. 725; 10 Tax Cases 118.

[5] *Inland Revenue* v. *Alex von Glehn & Co.*, [1920] 2 K.B. 553.

[6] *Partridge* v. *Mallandaine*, 1886, 18 Q.B.D. 276; 2 Tax Cases 179; *Canadian Minister of Finance* v. *Smith*, 1926, 42 T.L.R. 734.

[7] *Watney* v. *Musgrave*, 1880, 5 Ex. D. 241; 1 Tax Cases 272.

[8] *M'Gregor* v. *Macfarlan*, 1889, 26 S.L.R. 334; 2 Tax Cases 435; *Dow* v. *Merchiston Castle School*, 1921 S.C. 853; 8 Tax Cases 149.

[9] *Small* v. *Easson*, 1920 S.C. 758.

[10] *Stott* v. *Hoddinott*, 1916, 7 Tax Cases 85.

clients by law agents;[1] (8) costs of safeguarding applications; (9) cost of reduction of a company's capital;[2] (10) payments made to cancel contracts[3] or mineral leases;[4] (11) instalment payments by a carting contractor on account of an agreed sum payable by him for a right to deposit materials on certain ground: these were held to be capital.[5]

Subsection (8).—*Basis of Assessment.*

189. Until the year 1927–28 the basis of assessment was the three years' average, that is, "the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up or on the fifth day of April preceding the year of assessment" (Schedule D, Case I.). To that rule only the briefest reference is here necessary. The rule was abolished by s. 29 of the 1926 Act, but by subsection (3) an option was given to taxpayers on whom the transition to the new basis might have worked harshly. Any person who in 1926–27 had been charged on the three years' average was allowed to prove, if he could, that the profits of either of the first two years, which under the old rule would have come into the three years' average for the 1927–28 assessment, were less than the average of six years preceding those three years; and if he proved that, he could claim to continue the average system for 1927–28, but in that case he had to take the average for 1928–29 also. If he had not been in the business for all the nine years referred to, the average of the fewer years was substituted for the comparison. He had to give notice not later than 5th October 1927. In this way it comes about that the three years' average is in certain cases regulating the assessment for 1928–29.

190. The general basis of assessment now is the ascertained profit of the preceding year (1926 Act, s. 29); that is to say, each year's assessment is the amount of the preceding year's profit. That is a very short way of stating it, but it is more exactly formulated in s. 34 of the 1926 Act "where it has been customary to make up accounts (1) if only one account was made up to a date within the year actually preceding the year of assessment, and it was an account for a year, the year included in that account is taken to be the year preceding the year of assessment"; (2) if in the year actually preceding the year of assessment either no account for a year was made up, or more than one account were made up, the Commissioners of Inland Revenue decide what period of twelve months shall be deemed to be "the year preceding the year of assessment." For this purpose all apportionment of profits is on a time basis.[6] In

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[1] *Inland Revenue* v. *A. & B.*, 1928 S.C. 745.
[2] *Arch. Thomson, Black & Co.* v. *Inland Revenue*, 1919, 56 S.L.R. 185.
[3] *Countess of Warwick S.S. Co., Ltd.* v. *Ogg*, [1924] 2 K.B. 292; 8 Tax Cases 652.
[4] *Mallett* v. *Stavely Coal & Iron Co.*, [1928] 2 K.B. 405.
[5] *Inland Revenue* v. *Adam*, 1928 S.C. 738.
[6] Finance Act, 1926, s. 35.

cases under Schedule D and under all other schedules where the basis of assessment is last year's actual figures, it matters not that there is no profit or income at all from that source in the year of assessment, provided the source itself is retained.[1]

SUBSECTION (9).—*New Businesses.*

191. The new rules are found in s. 29 of the 1926 Act and s. 23 of the 1927 Act, and they work out thus. In a case where the business started on, say, 6th October 1928, the first year 1928–29 contains only six months' trading. If the first account is made up for the year to 5th October 1929 and shews a profit of £1000, applying the rule of time-apportionment,[2] one-half of that (£500) is taken to be the profit of the tax year 1928–29. The 1928–29 assessment is, therefore, on £500, less earned income relief. The second year, 1929–30, is the first full year of trading. The assessable profits are £1000. The standard is the preceding "year," which was only half a year; it shewed £500 as above; therefore, on the principle of time-apportionment, a full year must shew £1000. But the trader has here an option,[3] namely, to substitute the actual profits of the tax year 1929–30. Suppose the account to 5th October 1930 shews a profit of £800, the assessable figure for 1929–30 will be £900, reached by taking one-half (£500) of the first full year's account for the six months from April to October 1929, and one-half (£400) of the second year's account for the six months from October 1929 to April 1930. For the third year, 1930–31, the profits of the trader's last financial year, from October 1928 to October 1929, £1000, give the assessable figure; and so on in future years.

SUBSECTION (10).—*Partnership Changes.*

192. The new rule on those matters is contained in s. 32 of the 1926 Act. Assuming that the change occurred after 5th April 1928 the changes here referred to may be various: (1) The retirement of a partner; (2) the death of a partner; (3) dissolution as to one or more of the partners; (4) the admission of a new partner; (5) a sole trader enters into partnership to carry on the business; but in cases (1) to (4) it is assumed that one or more of the old traders carry on. Here we have an example of the principle that it is the business that is taxed. The rule is that "the tax payable . . . shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession, or vocation during the period prescribed by the Income Tax Acts." In other words, the new traders will be assessed exactly as if they were the old traders, and as if no change had taken place. Apportionments of liability as between the parties may be made by the Commissioners (Rule 9 of Schedule D, Cases I. and II.), and this power is saved by s. 35 of the 1926 Act. But in the event of any of the changes mentioned

[1] Finance Act, 1926, s. 22. [2] *Ibid.*, s. 35. [3] *Ibid.*, s. 29 (*b*) (iii).

above the parties have an option, subject to two conditions.[1] The option is to have tax "for all years of assessment" imposed as on two separate concerns: (1) A business discontinued on the date of the change, with all the consequences of that as stated below;[2] and (2) a business commenced on that date with all the consequences of that as stated above.[3] The conditions are: (1) All parties interested—outgoers, or their representatives, continuers, and incomers—must concur to exercise the option; and (2) they must intimate in writing within three months after the change.

SUBSECTION (11).—*Succession in Business.*

193. The case here referred to is that in which there is no continuing unit in the personnel of the concern. It is dealt with in paragraph (2) of rule 11 as enacted in s. 32 of the 1926 Act. In this case there is no option. The old concern is treated as discontinued and assessed accordingly as stated below,[2] and the new concern is treated as a new business and assessed accordingly as stated above. This covers such cases as (1) partnership changes when there is no continuing party; (2) the sale of a business by A to B, or by A and B to C and D; (3) succession on death when there is no continuing party; (4) formation into a limited company; but in this last case a concession may be obtained when there is no real change in the beneficial interests.[4] If a partnership is dissolved and each partner carries on separately, that is not regarded as a succession; the old business is discontinued, and each partner is for the future regarded as commencing a new business.

SUBSECTION (12).—*Discontinuance of Business.*

194. This case is dealt with in s. 31 of the 1926 Act. It means that the business is "permanently discontinued"—*i.e.* that there is total relinquishment with no successor. Accordingly a sale of a business to a company is not a case of discontinuance. When there is discontinuance, say, on 31st January 1929, the tax consequences are: (1) There is an assessment on the business for the period from 6th April 1928 to 31st January 1929, subject to any set-off for losses. This assessment is on the actual profits of the period in question, so it may be a benefit to either side as compared with taking a proportionate part of the preceding year's profits; (2) if the actual profits of the year preceding the year in which the discontinuance occurs—in the above assumed case the actual profits of 1927–28—(say £1000) exceed that year's assessment (say £900), the difference of £100 may be additionally assessed. But when it is the other way about, namely, where the actual profits of the year preceding the year in which the discontinuance takes place were less than that year's assessment, the taxpayer obtains no relief

[1] Proviso to s. 32 (1) of the Finance Act, 1926.
[2] See para. 194, *infra*.
[3] Para. 191, *supra*.
[4] Finance Act, 1927, s. 29.

on that account. The object of the Department taking power to levy additional tax on the year preceding the year of discontinuance is to meet cases of businesses having made exceptionally large profits in one year, and the owners retiring to escape assessment in the following year on that basis; of this there were some notorious cases.

Subsection (13).—*Wear and Tear.*

195. An allowance is given on this head to traders, manufacturers, and other business men,[1] and now also to professional men.[2] Tear and wear is physical or material wearing out by use, and that only. It thus differs from both depreciation and obsolescence. Depreciation takes place in buildings, and more particularly in leaseholds, from the mere effluxion of time, but for that no income tax allowance is obtainable except the one-sixth extra deduction in the case of mills, etc., mentioned above.[3] Obsolescence [4] may arise even in the case of a perfectly new machine. The wear and tear allowance is given only on plant and machinery belonging to the taxpayer or let to him on terms which place on him the burden of maintenance. The words "plant and machinery" are not defined in the Income Tax Acts, but they have been elucidated by decisions and by long practice, and arrangements have been made between the Department and various trades. The allowance is not given on light tools, utensils, etc., which are frequently renewable, and those renewals can be charged as trade expenses. The allowance is confined to machinery, plant, fixtures, and heavier articles of furniture and fittings. It has been refused on stud horses [5] and on a solicitor's law books; [6] *quære* as to wagons owned for the purpose of being hired out.[7] Whether or not a harbour can be plant, its silting up is not wear and tear.[8]

196. The Acts contain no scale of allowance, and there is no limit, except that the total allowances on any piece of machinery shall never exceed the cost of it to the claimant, which may be less (or possibly more) than its original cost. On the application of this exception to the occupation of land, see Finance Act, 1925, s. 16 (ii). Scales, however, have been in practice adjusted in different trades, and are easily procurable. The scales, of course, vary for different classes of plant, and various rates of allowance may be obtained by one taxpayer in the same year on different sections of his machinery. If an application is made to the Department for an alteration of the rate of allowance, it will be referred to a board of referees, if the Department is satisfied that it is not frivolous, and the referees will adjudicate if satisfied that the application is made on behalf of a considerable number of persons in

[1] Sched. D, Cases I. and II. rule 6.
[2] Finance Act, 1925, s. 16.
[3] See para. 184, *supra*.
[4] See para. 185, *supra*.
[5] *Earl Derby* v. *Aylmer*, [1915] 3 K.B. 374; 6 Tax Cases 665.
[6] *Daphne* v. *Shaw*, 1926, 43 T.L.R. 45; 11 Tax Cases 256.
[7] *Gloucester Rly. Carriage Co.* v. *Inland Revenue*, [1925] A.C. 469.
[8] *Dumbarton Harbour Board* v. *Cox*, 1919 S.C. 162.

one line of trade. A fundamental rule is that the allowance is given, not on the original cost of the plant, but on that cost less previous wear and tear allowances, or on the written-down value as it is called; to this there is one exception in the important case of ships. A special list (or lists) must be kept of the machinery, the successive years' allowances of depreciation must be deducted, but without any addition for interest,[1] and each year's allowance is calculated on the reduced figure, plus additions to machinery during the year, but minus the written-down value (not sale price) of machinery sold during the year. It is on the resulting figure that that year's allowance is calculated. If profits are less than the allowance, the unsatisfied excess of the allowance is carried forward against subsequent years. If there is a loss, the wear and tear allowance increases the loss, and therefore the claim ought to be made even in a year when there is no profit or a loss.

197. The allowance is not personal, so that any carry forward of unsatisfied allowance is claimable against future profits by a successor in the business, even though he has not purchased or succeeded to the identical plant.[2] The allowance is not treated as a business expense; on the contrary, the proper statutory figure of profit for the year of assessment (now last year's profit) is first ascertained apart from this allowance, and then this year's wear and tear allowance is deducted. The allowance is thus an integral step in settlement before any assessment is made. The general rule is that this is the only way of obtaining the allowance, and that there can be no repayment claim for wear and tear. At least it is commonly so laid down; but it is known that in some districts it is allowed by repayment and within the six years' time-limit. An exception occurs (paragraph (5) of the rule) when machinery or plant is let on such terms that the burden of maintaining and restoring it falls on the lessor; assuming that the plant is included in the Schedule A assessment, the tax on which is deducted by the lessee from the lessor on payment of the rent, the latter may claim an allowance by repayment within one year after the end of the year of assessment. The wear and tear allowance is an actual decrease of profits and income, and not a mere tax allowance; therefore it is deducted before the one-sixth of earned income relief is calculated.

198. From what has been stated it follows that the taxpayer has a choice of courses. He may decide to claim wear and tear, in which case he may, in addition, charge against profits (1) repairs to plant and machinery, (2) renewals of lighter tools and utensils, (3) repairs to buildings so far as not allowed under Schedule A, (4) the written-down value of any machine discarded as obsolete, and replaced, less salvage; but not [3] (5) renewals of plant or machinery. Or he may decide not to claim wear and tear, in which case he may charge to profits all the items just mentioned, including (5), but not additions. It appears that

[1] *Leith, etc., Packet Co.* v. *Musgrave*, 1899, 1 F. 1117; 4 Tax Cases 80.
[2] *Scottish Shire Line* v. *Lethem*, 1912 S.C. 1108; 6 Tax Cases 91.
[3] *Caledonian Rly. Co.* v. *Banks*, 1880, 8 R. 89; 1 Tax Cases 487.

in certain cases wear and tear may be allowed on one part of the plant and renewals on another part.

Subsection (14).—*Losses.*

(i) *Set-off of Statutory Losses.*

199. In income tax law a loss may mean two different things: (1) A minus quantity for assessment when regarded on the income tax basis of statutory profit or loss; or (2) an actual loss in the year of assessment. First, as to the statutory loss, which was provided for in the 1842 Act and is now dealt with in Rule 13 of Cases I. and II. of Schedule D. A trader may have an actual profit in the year of assessment, but on the basis of the preceding year the statutory figure may be, say, a *minus* £400, because in that year he had an actual loss of that amount. Under the three years' average this was called an average loss; now that the average is abolished, it may be distinguished as a statutory loss. The same trader may also, however, carry on another separate trade, in which, in the same year of assessment, his statutory profit for assessment is £500, because that was his actual profit in the second trade in the preceding year. In such a case the statutory loss of £400 in the one trade can be put against the statutory profit of £500 on the other, and, on the whole, the trader has a statutory profit of only £100 to be assessed. This holds though the one trade is carried on by a husband, and the other by his wife; and also where one or both of the trades are carried on as a partner in a firm or in different firms. The rule applies only to trade against trade, not to trade against profession, nor *vice versa*, nor to profession against profession, nor to trade against employment, nor to trade against charity.[1] The claim is made by individuals, including partners as such, not by the firms. It is said to be expedient to make the claim before any assessment notices arrive. The claim has no effect on future assessments. Until the Act of 1926 there was no provision for carrying forward any such loss; if satisfaction could not—and it seldom could—be obtained against a statutory profit in another trade, it could not be obtained at all. Even now it can be obtained only in the two ways: (*a*) Against a statutory profit in another trade in the same year; (*b*) against profits of the same trade within the next six years. This claim is not here discussed, because the position in which such a claim can be made—the existence of two separate businesses—is not common; and, besides, the importance of the claim has been greatly reduced by the introduction, long after the Act of 1842, of the claim for actual loss referred to in the immediately following paragraph, taken in conjunction with the recent change of the basis of assessment to the income of the preceding year. As to the distinction

[1] *Brown* v. *Watt*, 1886, 23 S.L.R. 403; 2 Tax Cases 143; *Religious Tract Society* v. *Forbes*, 1896, 23 R. 390; 3 Tax Cases 415; *Grove* v. *Y.M.C.A.*, 1903, 88 L.T. 696; 4 Tax Cases 613; *Grimes* v. *Lethem*, 1898, 3 Tax Cases 622; *Bray* v. *Brothers*, 1897, 13 T.L.R. 325; 3 Tax Cases 550.

between two trades and two departments of the same trade, see the case cited.[1]

(ii) *Actual Losses.*

200. These are provided for in what is now s. 34 of the Income Tax Act, 1918. It refers to an actual loss in the year of assessment, which means, of course, not a particular loss on some individual transaction, but a loss on the whole year's working [2] when computed according to the statutory rules. It is the trading of the year of assessment itself, not the preceding year, which is looked to. In any year in which a trader or professional man makes an actual loss he is entitled, if he thinks fit, to claim repayment of tax equal to tax on the amount of the loss. It is not a case of throwing over the statutory profit, for if in the preceding year the profit was £500, that sum is still reckoned as part of the statutory total income for the year of loss, and the assumption is that tax is first paid on that total income. Thus, if last year's actual profit was £500, that is this year's statutory profit. But suppose that this year actually shews a loss of £400. If tax has not been paid, the liability will be revised on the footing that the profit is £100. If tax has been paid on the £500, there will be an equivalent repayment. But the point is that the basis of tax is a plus quantity of £100, not a minus quantity of £400. The allowance is made first out of tax on earned income, but the claim is good also against tax on investment income of the same year.

201. As to the consequences of this relief. (1) In the year in which relief is given, total income is reduced by the amount of the loss on which relief is given. That may work both ways. It may further favour the taxpayer by (*a*) avoiding sur-tax, (*b*) entitling him to the age relief; but, on the other hand, it may (*a*) reduce his earned income relief, (*b*) reduce his life assurance relief as regards both the amount and the rate at which relief is given, (*c*) make it impossible to obtain his other allowances in full. (2) In the year after the year in which the relief is given the statutory income must be *nil*, because it is measured by the figures of the preceding year, and the existence of a loss in that year leaves it *nil*, even though relief was obtained on the whole of that loss. But this is subject to two qualifications—(*a*) the specialty regarding wear and tear stated below, and (*b*) the allowance of the loss claim converts the loss year into *nil* only as against the person who has obtained the loss relief.[3] (3) In subsequent years the statutory profit is reducible by any unsatisfied balance of the old loss, subject to the restrictions stated above. In fixing the amount of loss the wear and tear allowance, if any, is added on, which is said to be only by concession; but if that is done, that year must be counted in the next year as a positive figure to the extent of the wear and tear allowance. The

[1] *Howden Boiler, etc., Co.* v. *Stewart*, 1925 S.C. 110; 9 Tax Cases 205.
[2] *Rex* v. *Commissioners for London*, 1904, 91 L.T. 94.
[3] 1918 Act, s. 34 (4); 1926 Act, s. 33 (1), (3).

concession applies only to the wear and tear of the year of loss, not to any unsatisfied wear and tear carried forward from earlier years.

(iii) *Carrying Forward of Losses.*

202. At least as regards actual losses, new provision was required on this subject when the change over was made from the "average" basis of assessment to the present basis of the figures of the preceding year. Under the three years' average an actual loss (but not an average loss) was automatically carried forward for three years, if and so far as relief was not obtained in the year in which the loss occurred. A new system of carry-forward of losses is contained in s. 33 of the Finance Act, 1926. That section begins by referring to the two different kinds of losses which have been distinguished above: (1) Actual losses in the year of assessment in any trade or profession, which losses may, under s. 34 of the Income Tax Act, 1918, be the ground of a claim for repayment, good against the tax paid or borne for that year on any income of the same person; and (2) statutory losses in trade, which may, under Rule 13 of Cases I. and II. of Schedule D, be set-off against an average profit for the same year in any other trade. Next, s. 33 of the 1926 Act proceeds to assume that relief has not been "wholly" given against losses of those kinds in the respective ways just indicated "or under any other provision of the Income Tax Acts." Then the section enacts that the taxpayer "may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Schedule D in respect of that trade, profession, or vocation for the six following years of assessment." It will thus be seen that the principle of carry-forward is extended to statutory losses.

203. The only further conditions laid down in the section of which notice need be taken here are that this relief shall be given off the first available profits after the year of loss, and that the losses so relieved may start with losses incurred in the year preceding the tax year 1927–28. The system thus introduced requires close and careful study, and it is necessary to note: (1) The existing reliefs under s. 34 of the 1918 Act (actual losses whether in trades or professions) and under Rule 13 (statutory losses in trades where another trade also is carried on) are not repealed; nor does the enforcement of those existing reliefs, if and so far as available, bar this new carry-forward *quoad ultra*. (2) The carry-forward is no doubt for six years, but of those six years it is manifest that there cannot possibly be more than five in which the relief can be effective, for the first of them can afford no relief, the assessment there being necessarily *nil*, following as it does on a year of loss; this is subject to the wear and tear specialty stated above.[1] (3) The

[1] See para. 201, *supra*.

set-off in those future years is limited to assessed profits in "that trade, profession, or vocation," *i.e.* in which the loss occurred. This contrasts with the reliefs in the year of assessment itself, namely (*a*) in the case of actual losses, against the taxpayer's whole income of all kinds; and (*b*) in the case of statutory losses in trade, against the profits of another trade. The carry-forward would not even be good against any new trade or profession which the same taxpayer might commence. (4) The relief is limited to future profits on which "he" is assessed, that is, the person who suffered the loss. The relief is not an assignable right and will not pass to a successor; but the section opens by stating that the relief is available to any person who has suffered a loss "either solely or in partnership," and in like manner it will be good against his interest in the future profits of the same concern within the six years, whether he is then in business solely or in partnership. (5) The condition that the relief must be taken against the first available assessments prevents the taxpayer trying to do better by waiting for a later year—within the six years' time-limit—in which the relief would pay him better. As to that it will be understood that the future assessments against which relief is allowed are gross assessments before bringing in any personal, family, and life assurance allowances, and thus it may happen that this carry-forward of relief in some years merely extinguishes a gross assessment which would in any case have been extinguished by these allowances.

Subsection (15).—*Partner's Share for Tax Purposes.*

204. For all purposes of exemption and relief each partner is entitled to have his share of the profits treated separately, though there is only one assessment on the firm as a whole. That share is his actual proportion for the year of the firm's assessable profits ascertained in terms of the Act. Thus, if the firm's profits last year were £2000, that is this year's assessment on the firm. Assume that B's share of profits in terms of the contract of copartnery was last year one-fourth, and this year is one-half. B's statutory income from the business is £1000; it is also his actual income if the profits this year are £2000, but his actual income may be either more or less according to the profits, and it is double his last year's share. Again, take the case of the admission of a new partner, C, at the beginning of this year; his share of profits is to be one-fourth. Last year's profits of the firm were £2000. There is no joint request that the new firm shall be treated as a new business (1926 Act, s. 32). This year's profits are only £1000. C's statutory income from the firm this year is £500 (one-fourth of £2000), though his actual share of this year's profits is only £250. The rule thus illustrated is enacted in s. 20, proviso (ii), of the Income Tax Act, 1918, as follows: "The income of a partner from a partnership carrying on any trade, profession, or vocation shall be deemed to be the share to which he is entitled during the year to which the claim relates in the partnership

profits, such profits being estimated according to the several rules and directions of this Act."

SUBSECTION (16).—*Earnings Account or Cash Account.*

205. In income tax practice two bases or forms of account are known—earnings or cash. An account on the cash basis is unknown, and would not be accepted in any commercial case except perhaps in the very smallest of retail shop cases; and even then it would need to be "edited" before it would be allowed to supply an assessment basis. The only exception is in the case of some farm accounts, but there also additional information has in practice to be supplied and incorporated. In all commercial cases the item of stock-in-trade bulks materially, and there is reason to believe that it is because that factor is absent in professional practices that it is still common to find assessments in considerable professional cases proceeding on a cash account only. The absence of stock does not sufficiently explain this, for in professions as in trade the whole result of a year's account may turn on the inclusion or exclusion of fees earned during the year, but still outstanding uncollected at its close. In any case, it is the fact that professional men have in the past, and up to date, usually been allowed to settle their tax liability on either the earnings or the cash system of accounting, assuming it to be the system on which the accounts were kept, and provided that one of those systems was selected and adhered to. In established practices, if this has been the practice and is accepted by the local Commissioners, the Department does not object. But there is no statutory authority for a cash basis, and it is now found that on the commencement of new professional practices the earnings basis is insisted on, and that demand cannot be resisted.

206. Under the cash system the account omits everything earned if it has not been received, and also expenses incurred but not paid. On the other hand, it includes all fees received during the year though earned in previous years, and all expenses paid within the year though incurred in previous years. There is thus avoided all trouble about bad or doubtful debts due to the business, for nothing is entered unless and until actually received in cash. It is, however, to be noted that this is apt to cause trouble in partnerships when changes occur, and it is suggested that it ought to be provided for in advance in contracts of copartnery, as to both beginning and end, which it rarely, if ever, is. Under the earnings system of account there is a valuation of all outstanding earnings and income liabilities. Bad debts do not go in, and reasonable allowances are made for doubtful debts. If this year payment is received of an account which was earned and entered last year, nothing goes into this year's account if the receipt this year is exactly what was put down for that account last year; if less or more, the corresponding adjustment is made; and last year's liabilities are treated in the same way.

Section 12.—Schedule D, Case III.

Subsection (1).—*Generally.*

207. Broadly, what are taxed under this Case are interest and annuities received without deduction of tax at the source, and "all discounts" which necessarily are received without tax being deducted. It is true, however, that Case III. has always contained as a kind of excrescence the provisions for assessing dealers in cattle and dealers in or sellers of milk, to which reference has been made under Schedule B.[1] Further, by s. 28 of the Finance Act, 1926, certain classes of income have been removed from Schedule A, II., to this Case of Schedule D, the most important category being teinds; but deductions remain as before. The basis of assessment is the income of the preceding year without any deduction,[2] subject to variations consequent on the non-existence of the source of income in the year of assessment and changes in the amount held.[3] The non-receipt of income in the year of assessment does not bar assessment in that year on the figures of the preceding year,[4] but the retention of the source of income during some part of the year of assessment is essential to any liability.

208. Under s. 17 of the 1922 Act the rules are: (1) In the year in which the income first arises, the assessment is on that year's income; (2) in the rare case of the income first arising on 6th April of the first year, the assessment in the second year is on the first year's figures; (3) in any other (the ordinary) case, the assessment in the second year is on the second year's figures; (4) in the first year in which the figures of the preceding year are the basis of assessment, the taxpayer may claim, instead, to be taxed on the figures of the year of assessment. Then as to the last year of all, s. 30 of the 1926 Act provides in effect that the assessment shall be on the figures of that closing year, but that it shall be open to the Department to re-assess the preceding year on its own figures if larger than the figures on which it was assessed, but with no corresponding right to the taxpayer in the converse case.

Subsection (2).—*War Stock and Bank Interest.*

209. The most familiar classes of income which are dealt with under Case III. are (1) interest on certain British Government securities, particularly the five per cent. War Loan and National War Bonds; and (2) deposits in banks. In connection with the former class the following additional rules are of great importance, and also productive of much trouble to all concerned: (1) Each Government security is treated as a separate source of income; (2) this is carried so far as to treat each issue of National War Bonds as a separate source; (3) further,

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[1] See para. 146, *supra*.

[2] *Lord Inverclyde's Trs.* v. *Millar*, 1924 S.C. (H.L.) 103; 1924 A.C. 580; 9 Tax Cases 14 (refusing set-off of interest on estate duty); Finance Act, 1922, s. 17, 2 (2).

[3] Finance Act, 1922, s. 17; and Finance Act, 1926, s. 30. [4] Finance Act, 1926, s. 22.

in those respects the holdings of a husband are treated separately from those of his wife, but only for this purpose; (4) any addition to the holding of a particular class already held is treated as a new source, and Rules (1) to (4), stated in the preceding paragraph, apply separately to that addition accordingly;[1] (5) any sale or other cessation of a part of the holding of any class is treated separately; this by proviso (i) of s. 30 of the 1926 Act, with the result that there arise, as to that part, the consequences stated at the close of the preceding paragraph in regard to a total cessation. In connection with these rules it is necessary to recall also the case of holders of such Government securities payable without deduction of tax requiring that tax shall be deducted.[2] The effect of that is that the securities are thereafter held to be substituted securities different from the original securities, and for the present purpose that is treated as a case of cessation of the source of income.[3]

Subsection (3).—*Discounts.*

210. It is understood that Case III. is the only category under which discounts can be taxed as such, though in the case of companies carrying on an investment or financial business discounts are reached as trading profit. The case of discounts on Treasury bills was very fully considered, and there were divergent views regarding the proper measure of assessable profit in the event of such a security being resold before maturity, but the final decision was that the correct measure is the difference between the price paid and the price obtained, irrespective of the facts of fluctuations in the money market.[4] It may be accepted that a private individual buying such securities has assessable income in the discount. But it is not known that it has ever been suggested that a private individual, buying either a redeemable stock, or a terminable debenture, or a heritable security, at a price below par, is liable to assessment on that difference as discount, though all interest receivable between purchase and maturity is taxable in ordinary course.

Subsection (4).—*Interest.*

211. Interest is a separate head of charge, even though there is no profit or a deficiency.[5] Though an item is called interest it may in essence be damages, and then it is not assessable;[6] but when a trustee is ordered to replace a lost asset with interest, the latter is assessable.[7]

Subsection (5).—*Transactions* cum *Dividend.*

212. When stocks are sold *cum* dividend the vendor cannot be assessed on an apportioned part of the price as representing accrued

[1] Finance Act, 1926, s. 30, proviso (ii). [2] 1921 Act, s. 27. [3] 1926 Act, s. 30 (3).
[4] *National Provident Institution* v. *Brown*, [1921] A.C. 222; 8 Tax Cases 57.
[5] *College of Preceptors* v. *Jenkins*, 1919, 121 L.T. 120; 7 Tax Cases 162.
[6] *In re National Bank of Wales*, [1899] 2 Ch. 629; *Inland Revenue* v. *Ballantine*, 1924, 8 Tax Cases 595. [7] *Schulze* v. *Bensted*, 1916 S.C. 188; 7 Tax Cases 30.

dividend or interest.[1] This is a recent decision, but it only expresses the rule which has always been followed in Scotland, with official recognition, when the sale is by trustees, and part of the price (less a deduction for tax) is carried to the credit of the liferenter; the purchaser's liability to tax on the whole of the next dividend is held to enfranchise all interests on the vendors' side. In those *cum* dividend transactions the whole dividend is assessable income in the hands of the purchaser.[2]

SUBSECTION (6).—*Deduction at Source.*

213. The payer is entitled to deduct tax from interest in, *inter alia*, the following cases: Interest on a price,[3] interest included in a compound interest calculation,[4] interest included in a tender by a debtor under a mortgage,[5] interest on a legacy.[6] But when, as a condition of a decree of reduction of an alienation, the pursuer was required to repay the price with interest, it was held that he was not entitled to deduct tax.[7]

SUBSECTION (7).—*Annuities.*

214. Annuities present some special features. If it is the case of what the law regards as an annuity, the whole is taxable. But if the annual sum is reached by starting from a lump capital sum to be paid by instalments, it may escape altogether.[8]

SUBSECTION (8).—*Omnibus Assessments.*

215. By s. 30 of the Finance Act, 1926, it is provided that all items of income assessable under Case III. (and separately Case IV. and Case V.) of Schedule D may be assessed in one sum, but apparently this is only machinery and cannot operate to increase the liability.[9] The suggestion is that, if last year there were two sources of income each yielding £100, the new enactment does not warrant an assessment of £200 this year if the facts are that this year only one of the sources of income is retained.

SECTION 13.—SCHEDULE D, CASE IV.

SUBSECTION (1).—*Generally.*

216. This case applies to "income arising from securities in any place out of the United Kingdom." Until 1927–28 the basis of assessment was the full amount thereof arising in the year of assessment,

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[1] *Wigmore* v. *Summerson & Sons, Ltd.*, [1926] 1 K.B. 131; 9 Tax Cases 577.
[2] *Inland Revenue* v. *Forrest*, 1924 S.C. 450; 8 Tax Cases 704.
[3] *Bebb* v. *Bunny*, 1854, 1 Kay & J. 216.
[4] *In re Morris; Mayhew* v. *Halton*, [1922] 1 Ch. 126.
[5] *Graham* v. *Seal*, 1919, 119 L.T. 526. [6] *Re Ellis Jones*, [1923] I.R. 104.
[7] *Dunn* v. *Chambers*, 1898, 35 S.L.R. 537.
[8] *Delage* v. *Nugget Polish Co.*, 1905, 92 L.T. 682. Contrast *Oswald* v. *Mags. of Kirkcaldy*, 1919 S.C. 147. [9] Cf. *Inland Revenue* v. *Drysdale's Trs.*, 1928 S.N. 32.

whether the income has been or will be received in the United Kingdom or not, subject to the deductions stated later. By s. 29 of the Finance Act, 1926, this is altered to the full amount arising in the year preceding the year of assessment, whether it has been or will be received in the United Kingdom or not. The deductions and allowances in the case of income not received in the United Kingdom are (1) the same deductions and allowances as if it had been so received; (2) where such a deduction cannot be made under any other provision of the Acts, any sum paid in respect of income tax in the place where the income has arisen, but not if that place is a British dominion which grants reciprocal relief;[1] and (3) any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom. The rule above stated, subjecting to tax under this case income which is not brought home, does not hold in the following cases: (1) Persons not domiciled in the United Kingdom; (2) British subjects not ordinarily resident in the United Kingdom; (3) income of securities forming part of the foreign life assurance fund of an assurance company. In these three cases the basis of assessment is the full amount of the income of the preceding year which has been or will be received in the United Kingdom without any deduction or abatement. The changes and rules above stated do not apply to income arising in the Irish Free State, as to which the basis of assessment is the income of the year of assessment, whether brought to the United Kingdom or not, and in no case is there any exception.[2]

217. The question of what amounts to bringing income home is dealt with under Case V., where it now bulks more largely than under this case. Domicile is not dealt with at all in this article. Residence is treated below.[3]

Subsection (2).—*Securities and Possessions.*

218. Formerly much importance attached to the distinction between "securities" assessed under Case IV. and "possessions" assessed under Case V., but that is now of less importance in view of the general assimilation of the two cases in regard to the condition of liability. It seems sufficient to note that shares in a company are not securities.[4] When income has not been brought home, it becomes necessary to fix a rate of exchange at which it shall be converted with a view to assessment. It is usual to take the average rate for the year of account, but that may be varied in a proper case.[5] There are applied to this Case the rules stated above regarding new sources of income, and increase, diminution, and cessation of sources,[6] and also the

[1] Finance Act, 1920, s. 27 (4).
[2] Finance Act, 1926, s. 23, and Second Schedule, Part II. 1 (5).
[3] See para. 238 *et seq., infra.*
[4] *Singer* v. *Williams*, [1919] 2 K.B. 94; affd. [1921] A.C. 41; 7 Tax Cases 419.
[5] Chancellor of Exchequer in Commons on 23rd June 1922.
[6] See para. 209, *supra.*

rules regarding changes between taxation at the source or by direct assessment.[1]

Section 14.—Schedule D, Case V.

Subsection (1).—*Generally.*

219. This Case applies to income arising from possessions out of the United Kingdom. These are commonly referred to as "foreign possessions," but they include possessions within the Empire outside of Great Britain and Northern Ireland. They are divided into (1) stocks, shares, and rents, dealt with in Rule 1 of this Case; and (2) other possessions, dealt with in Rule 2. Between those two there is a fundamental difference in the basis of assessment. In both the basis is now the figure of the preceding year, but in the case of income from stocks, shares, and rents, the figure for assessment is the total, whether the income was brought home or was not, whereas in the case of other possessions it is only the figure of income which was brought home. Further, in the case of stocks, shares, and rents, the computation is, in the following circumstances, restricted to money brought home (1) if the receiver is not domiciled in the United Kingdom; (2) if he is a British subject not ordinarily resident in the United Kingdom; (3) investments of the foreign life assurance fund of an assurance company.

Subsection (2).—*Particular Cases.*

220. Instances of foreign possessions other than stocks, shares, and rents are sleeping partnerships in a business abroad, or in the dominions, not controlled from this country;[2] interest received from a foreign or dominion bank; an employment exercised wholly abroad;[3] remittances by foreign trustees, under a discretionary power, for the education of beneficiaries in this country;[4] and payments under a foreign decree of divorce.[5] When trustees received income from a business carried on abroad they were not allowed any deduction for any part of their home trust expenses.[6]

Subsection (3).—*Bringing Home Income.*

221. The question whether income has or has not been brought home is now of much less importance than formerly. The matter is so far defined in Rule 2 of Case V., which speaks of "actual sums

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[1] Finance Act, 1926, s. 30; as to trust cases see also para. 126 *supra*.

[2] *Colquhoun* v. *Brooks*, 1889, 14 App. Cas. 493; 2 Tax Cases 490. As to the meaning of "sleeping" here, see Lord Parker in *Egyptian Hotels, Ltd.* v. *Mitchell*, [1915] A.C. 1022; 6 Tax Cases 542. Contrast *Ogilvie* v. *Kitton*, 1908 S.C. 1003; 5 Tax Cases 338 (sole proprietor of the business).

[3] *Pickles* v. *Foulsham*, [1925] A.C. 458; 9 Tax Cases 261; *Fleming* v. *Wilkinson*, 1924, 10 Tax Cases 416.

[4] *Drummond* v. *Collins*, [1915] A.C. 1011; 6 Tax Cases 525.

[5] *Inland Revenue* v. *Anderström*, 1928 S.C. 224.

[6] *Aikin* v. *Macdonald's Trs.*, 1894, 22 R. 88; 3 Tax Cases 306.

annually received in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit, or on account, or in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom." There is also much case law on the subject, and a few of the later cases are cited below.[1] There are two different kinds of exception: (1) Book entries do not necessarily amount to receipt of money in this country, nor is that the effect of having, say, foreign bank deposit receipts in one's custody in this country, with the warrants for payment of interest; (2) remittance to, say, the Channel Islands is not receipt in Great Britain. Further, "received" means received by the person entitled to the income in question, and therefore money sent to this country for investment, or for the maintenance of his children at school here, by, or by the order of, a non-resident is not received by him in this country.

Subsection (4).—*Transition and other Rules.*

222. The following particular rules apply to this Case: (1) In cases of hardship on account of the transition from a three years' average to the basis of the preceding year, there may be relief on the same lines as stated above;[2] (2) the rules already discussed, applicable to new sources, and to increase, diminution, or cessation of sources, and to variations between taxation at the source or by direct assessment, apply;[3] (3) Irish Free State income is taken on the figures of the year of assessment or on an average of such period as the case may require to put it on the same footing as British income.[4]

Section 15.—Schedule D, Case VI.

223. This Case is limited to "any annual profits or gains, not falling under any of the foregoing Cases and not charged by virtue of any other Schedule." The basis of assessment up to 1927–28 was (Rule 2) "either on the full amount of the profits or gains arising in the year of assessment or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners." Case VI. is not included in the change over, made by s. 29 of the Finance Act, 1926, to the figures of the preceding year (subsection (2) of s. 29), but neither is Rule 2 of that Case allowed to stand unaltered, and the basis of assessment now is either the amount of the year of assessment or an average of a period not greater than one year. Another feature of the new system is found in s. 27 of the Finance Act, 1927. Previously there was no provision for any allowance for losses

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[1] *Gresham Assurance Co.* v. *Bishop*, [1902] A.C. 287; 4 Tax Cases 464; *Scottish Widows' Fund* v. *Farmer*, 1909 S.C. 1372; 5 Tax Cases 502; *Scottish Provident Institution* v. *Farmer*, 1912 S.C. 452; 6 Tax Cases 34.

[2] Finance Act, 1926, s. 29 (3); see para. 189, *supra*.

[3] *Ibid.*, s. 30; see para. 209, *supra*.

[4] *Ibid.*, 2nd Sched. Part II. 1 (4).

in matters falling under Case VI., but it is now provided that, if in the year of assessment a person sustains a loss in any transaction, partnership or not, of such a nature that profit, if any, would have been assessed under Case VI., he is entitled (1) to set-off the loss against any profit from any transaction in respect of which he is assessed for that year under that Case; and (2) to carry forward "as far as may be" the loss or any part of it not so set-off against any profit from any transaction on which he is assessed under that Case for any of the six following years of assessment. This relief applies to losses in the year 1926–27. It will be observed that it is a very limited right of set-off. Its operation, if any, must be found wholly within Case VI. assessments; there is no right of set-off of Case VI. losses against profits assessed under other schedules, nor *vice versa*; nor against investment income. Like all set-offs, it does not operate backwards; a loss this year gives no right of repayment of tax on a profit last year. There are provisions (s. 27 (2) and (3)) for partnership transactions and for the order in which the relief must be taken, on the lines of the like provisions under Cases I. and II.[1]

224. Case VI. is obviously a sweeping-up enactment, but care has to be used in its application. The profits or gains must be "annual," and it must not be the case of a trade, for that falls under Case I., and Case VI. avowedly is limited to matters "not falling under any of the foregoing Cases, and not charged by any other Schedule." A man with experience of the building trade purchased a number of houses, improved them a good deal, and turned over some of them by resale; the profit was held wrongly assessed under Case VI. as not being "annual," and the case was remitted for consideration whether it fell under Case I. as a trade or adventure.[2]

Section 16.—Schedule E.

Subsection (1).—*Scope of Schedule.*

225. This is the schedule under which employees and holders of office are assessed, both on their earnings while in office or employment and, after retirement, on pensions in respect of the office or employment.[3] The tax is mostly collected by direct assessment, but (1) Government salaries are taxed by deduction,[4] and (2) the tax on railway employees is assessed on the company.[5]

Subsection (2).—*Basis of Assessment.*

226. For the tax year 1928–29 and subsequent years the basis of assessment is the earnings (less permitted deductions) of the preceding year.[6] The statutory words are "salaries, fees, wages, perquisites, or

[1] See para. 203, *supra*.

[2] *Pearn* v. *Miller*, 1927, 6 Accountant's Tax Cases 519. See Murray and Carter on Income Tax, 11th ed., p. 92.

[3] Finance Act, 1922, s. 18.

[4] Sched. E, rules 11 and 12.

[5] Rule 7.

[6] Finance Act, 1927, s. 45 (1) (2).

profits or gains whatsoever." [1] Previously the basis of assessment was the earnings of the year of assessment, and that basis is still continued in the following cases: (1) Leave pay, etc., in terms of s. 17 of the 1923 Act; (2) profits of office or employment held or exercised occasionally or intermittently in this country by a person who is not continuously resident here; and (3) weekly wage-earners.[2] The second of these exceptions is aimed at dominion and foreign musicians, actors, etc., who pay more or less flying professional visits to this country; *quære* as to dominion lawyers appearing before the Privy Council. There is also an optional transition exception [3] to the effect that any person who was assessed and charged under Schedule E for 1927–28 on the emoluments of that year, in accordance with the old rule, is entitled to be assessed and charged for 1928–29 on the figures of that year if less than the 1927–28 figures. If this option is to be exercised, notice must be given on or before 30th June 1929, and then the year 1929–30 must also be taken on its own figures.

Subsection (3).—*Changes in Office, etc.*

227. In s. 45 (4) and (5) of the 1927 Act rules are laid down for the cases of new appointments and employments and the commencement of pensions, etc., chargeable under this schedule, and for termination of chargeability. (1) The first year is assessed on its own figures; (2) so is the second year if the first was a broken year, the appointment taking effect after 6th April; (3) the taxpayer may claim that the second full year shall be assessed on its own figures; notice is required within twelve months after the end of the year of assessment; (4) in the final year the assessment shall be on the actual emoluments of the period from 6th April to the end of the employment, etc.; and (5) if it is found that the emoluments of the year immediately preceding the final year were more than the sum assessed in that preceding year, the difference "may," and no doubt will, be assessed; but in the converse case of the emoluments having been less than the assessment in that preceding year, there is to be no repayment.

Subsection (4).—*Tax-free Salaries.*

228. Many important concerns pay salaries of all grades on lines generally described as free of tax, and directors' fees are often so paid. In point of fact, different concerns attach quite different meanings to the words "free of tax" in this relation, and it would not be correct to set up an analogy between salaries so paid and tax-free dividends,[4] nor in administration is any attempt to do so made by the Department. But the tax actually paid by the employer for or to an employee is

[1] Finance Act, 1927, s. 45 (10).
[2] *Ibid.*, s. 45 (1).
[3] *Ibid.*, s. 45 (3).
[4] See para. 267, *infra*.

part of his remuneration, and is assessable accordingly even though the employer is not under contract to pay the tax.[1] On the other hand, it is deductible by the employer as an expense of the business.

Subsection (5).—*Deductions.*

(i) *Rule* 9.

229. There are the following express rules on the subject of what deductions are allowable from gross emoluments under Schedule E. The deductions are those of "the year or portion of the year upon the emoluments of which the computation is made."[2] Rule 9 of that schedule provides: "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

(ii) *Rule* 10.

230. Rule 10 of Schedule E provides: "Where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments payable out of the public revenue that such persons are obliged to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties in respect of which such salary, fees, or emoluments are payable, the Treasury may fix such sum as in their opinion represents a fair equivalent of the average annual amount laid out and expended as aforesaid by persons of that class, and in charging the tax on the said salary, fees, or emoluments there shall be deducted from the amount thereof the sums so fixed by the Treasury."

(iii) *Rule 2 of All Schedules Rules.*

231. This rule provides: "In assessing the tax chargeable under any Schedule upon a clergyman or minister of any religious denomination, the following deductions may be made from any profits, fees, or emoluments: (*a*) Any sums of money paid or expenses incurred by him wholly, exclusively, and necessarily in the performance of his duty as a clergyman or minister; (*b*) such part of the rent (not exceeding one-eighth), as the commissioners by whom the assessment is made may allow, paid by him in respect of a dwelling-house any part of which is used mainly and substantially for the purposes of his duty as such clergyman or minister."

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[1] *North British Rly. Co.* v. *Scott*, 1923 S.C. (H.L.) 27; [1923] A.C. 37; 8 Tax Cases 332; *Hartland* v. *Diggines*, [1926] A.C. 289; 10 Tax Cases 247.

[2] Finance Act, 1927, s. 45 (2).

(iv) *Operation of the Rules.*

232. When the rules above quoted are compared with the corresponding rules applicable to Schedule D,[1] two distinctions are to be noted: (1) As regards deductions generally, the qualities postulated under Schedule D are merely that the money claimed as expenses shall have been expended "wholly and exclusively" for the trade, whereas under Schedule E the words are "wholly, exclusively, and necessarily"; and (2) as regards part rent of dwelling-house claimed by a minister as a deduction, there is a fourfold distinction; for under Schedule D (*a*) the statutory proportion is two-thirds; (*b*) it is variable, and it may be more or less; (*c*) the condition is that the part of the house shall be "used for the purposes of the trade"; and (*d*) it is recognised in practice that the allowance carries with it a like proportion of rates; whereas in the case of a minister, now under Schedule E, (*a*) the statutory proportion is one-eighth; (*b*) it is variable, but only in the sense that it may be less, not more; (*c*) the condition is that the part of the house shall be "used mainly and substantially for the purposes of his duty"; and (*d*) it is decided that it does not carry with it a proportion of rates.[2] In the case of a minister in Scotland the expense of an assistant has been refused as not being incurred "necessarily in the performance of the said duties," but more or less unnecessarily to procure some other person to perform them.[3] Conversely, the expense of a domestic servant is not a proper deduction, even though she is employed to relieve a woman of household duties so that she may be free to accept outside employment; it was so held in the case of a married woman and her husband who had been appointed jointly master and mistress of a school.[4] The expense of professional books is refused as being incurred, not in the performance of the duties, but in order to equip the holder to discharge those duties. Generally, it may be said that the Department draws a considerable distinction between the case of a man carrying on his own business or profession, and assessed under Schedule D, and the case of the holder of an office, assessed under Schedule E. The former has a degree of liberty of determining how he shall conduct his concern which is not accorded to the latter.

233. The cost of travelling to and from the place where the duties are performed, or the place of employment, is not allowed. Therefore the price of a season ticket will be struck out, though it is right to note that if the cash salary were reduced and a season ticket were added by the employer as part of the remuneration, the latter would not be an assessable item, being for personal use and not for sale.[5] All travelling expenses on the duties of the office or employment are deductible, and in the case of commercial travellers a more or less average rate of allowance on this head is frequently adjusted with the Department.

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[1] See paras. 168 to 188, *supra*.
[2] *Butcher* v. *Chitty*, 1925, 9 Tax Cases 301.
[3] *Lothian* v. *Macrae*, 1884, 12 R. 336; 2 Tax Cases 65.
[4] *Bowers* v. *Harding*, [1891] 1 Q.B. 560; 3 Tax Cases 22.
[5] *Tennant* v. *Smith*, [1892] A.C. 150; 3 Tax Cases, 158.

234. A minister of religion is allowed[1] (1) communion expenses if not reimbursed to him; (2) expenses of travelling on congregational and parochial visitation, both in and beyond the parish, which include tramway fares, railway fares, cabs, hiring, expense (or share) of keeping, stabling, and running a horse, horse carriage, motor car or cycle, including man's wages, if any, and also proper insurance premiums; (3) expense of travelling to outlying charge; (4) expense of attending church courts and committees, including hotels or equivalent charges; (5) upkeep of, and renewals to, means of conveyance; all repairs are chargeable and also cost of new machine, etc., of corresponding degree, less salvage; tear and wear is now chargeable;[2] (6) pulpit supply during absences on duty or illness, not during holidays; (7) stationery, directories, postage, telegrams, and telephone. It is said that nothing is commonly allowed for expense of collecting the stipend, but there are exceptions.

235. A Recorder residing in London was refused railway travelling and hotels when on his official visits as Recorder.[3] A similar decision was given in the case of a clerk to justices who resided and carried on business as a solicitor in one town and had to attend the justices' court in another town.[4] On the same principle which is mentioned in the case of doctors,[5] recognition is given to a greater or less degree to the social requirements which become practically obligatory in certain lines of business, *e.g.* a traveller engaged in pushing expensive motor cars, salesmen and saleswomen in fashionable jewellers and dressmaking shops, a stockbroker's "runner," and the representative, of either sex, of a turf accountant in a large way of business. Whether by way of legal deduction or departmental concession some allowance may be obtained in such cases, to which end it is important that details shall be available to a reasonable degree; but the practice varies in different districts. Though the word "allowance" is sometimes used with reference to the different matters referred to in this paragraph, they are really actual reductions of the income, which is tested by the consideration that the earned income relief is calculated only on what remains after those "allowances" are deducted.

Subsection (6).—*Weekly Wage-earners.*

236. Employees of this class are now assessed under Schedule E on their earnings.[6] The basis of assessment continues to be the earnings of the year of assessment.[7] This branch of the subject was of great importance during, and for a time after, the Great War, but now the position is greatly changed in that respect. "Weekly" is a misnomer, for "weekly wage-earner" means "a person who receives wages which

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[1] *Jardine* v. *Gillespie*, 1907 S.C. 77; 5 Tax Cases 263. [2] But see para. 198, *supra*.
[3] *Ricketts* v. *Colquhoun*, [1925] 1 K.B. 725; 10 Tax Cases 118.
[4] *Cook* v. *Knott*, 1887, 4 T.L.R. 164; 2 Tax Cases 246. [5] See para. 170, *supra*.
[6] Finance Act, 1922, s. 18. [7] Finance Act, 1927, s. 45 (1) (*c*).

are calculated by reference to the hour, day, week, or any period less than a month, at whatever intervals the wages may be paid, or who receives wages, however calculated, which are paid daily, weekly, or at any less intervals than a month.[1] The term applies only to persons "employed by way of manual labour in respect of the wages arising from that employment and does not apply to persons employed as clerks, typists, craftsmen, or in any other similar capacity." [2]

237. Deductions are allowed for clothes, boots, etc., where there is special wear of these; also for tools, explosives, etc., where the employees have to provide these. For those deductions the Department has adjusted flat rates in the more important industries. The collection is now half-yearly.[3]

Section 17.—Residence.

Subsection (1).—*Individuals.*

238. Residence, not nationality or domicile, is the important personal qualification under the Income Tax Acts. It is referred to in the Acts sometimes barely under the term "residence," "residing" or "resident," or "not resident," and at other times as "ordinarily resident," "ordinary residence," "actually residing," "occasional residence abroad." There is a great mass of case law, and the subject has recently received very full and authoritative judicial consideration both in the Court of Session [4] and in the House of Lords.[5] Appeals to the Courts have been granted on the matter of residence; but it is treated as a question of fact, and the most recent cases shew the difficulty which that creates in overturning the findings of the Commissioners.[6]

239. Three elementary considerations are (1) that residence for this purpose is a personal, not a property or tenancy, qualification; (2) that a person may be resident, and ordinarily resident, in more than one place at the same time; [7] and (3) that the six months' rule [8] cannot be applied negatively, on an arithmetical basis, so as to establish exemption wherever there has been absence from this country for six months in one tax year, even though no house is maintained here. Where the individual starts from a British residence he is much more easily held not to have lost it than if it were a case of attempting to prove the institution of a British residence by the same facts.[9] As regards the balance of those two factors—a home elsewhere only and visits to this country—the case of *Lysaght* goes to shew that, when there has originally been residence here, it will persist in law though the visits to this country are for business purposes only. But as to that

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[1] Income Tax Act, 1918, s. 237.
[2] Sched. D, Cases I. and II. rule 2.
[3] Finance Act, 1925, s. 18.
[4] *Reid* v. *Inland Revenue*, 1926 S.C. 589; *Peel* v. *Inland Revenue*, 1928 S.C. 205.
[5] *Levene* v. *Inland Revenue*, [1928] A.C. 217; *Lysaght* v. *Inland Revenue*, [1928] A.C. 234.
[6] See opinion of the Lord Chancellor in *Lysaght*, *supra*.
[7] *Dicta* in *Swedish Central Rly. Co.* v. *Thompson*, [1925] A.C. 495; 9 Tax Cases 342.
[8] Income Tax Act, 1918, Sched. D, Miscellaneous Rules, 2.
[9] General Rules all Schedules, rule 3; per the Lord Chancellor in *Levene*, *supra*.

it is to be noted that, though nowhere so laid down, it always seems to be assumed that to amount to residence, or a basis for inferring residence, visits must include sleeping in this country. That means that the time unit for dealing with these matters is a twenty-four hours' day. It has been remarked [1] that if Mr Lysaght's business visits from his Irish home to this country had all been undertaken by air-travel both ways, so that he was at his Irish (and only) home each night, the decision of the Court of Appeal in his favour might have stood.

240. The cases of *Levene* and *Lysaght* had the following features in common: (1) There was no complication by the taxpayer having retained or maintained a house in this country; (2) both parties made visits to this country, and these were of considerable duration, though under six months in any tax year; (3) both parties had originally been fully established in this country. The cases differed in the following respects: (1) In the material years the one party had no fixed local habitation of a home out of this country; the other had; (2) the visits of the one to this country were irregular and not for business except his tax concerns; those of the other were at stated intervals for business purposes. It would appear that *Levene's* case establishes that, if a man starts from the possession of a British home, visits to this country will result in universal liability to tax here, notwithstanding the breaking up and selling off of that home, and notwithstanding that the visits do not amount to six months in a tax year, up to at least the time when he sets up a home elsewhere. *Lysaght's* case negatives the existence of any differentiation in favour of the visitor because his visits are for business. The Department issued a memorandum and a letter of instructions to bankers in January 1924 applicable to such cases. These are still available in print on application; but it is recognised that the later decisions may now require them to be revised.

Subsection (2).—*Companies.*

241. Companies differ from partnerships in two respects. A British company, unlike a partnership, must be registered in this country and it is a separate *persona*, which in England a partnership is not. It is suggested for consideration whether the element of registration may operate in the case of limited partnerships as it does in the case of companies.[2] It is now recognised that an incorporated company may be resident in more than one country.[3] The question of the liability of companies to British income tax becomes complicated when the company is formed and incorporated and has its registered office in this country but trades only abroad, and that trading is controlled abroad. If the foreign trade is controlled from this country there is clearly liability on the whole profit, and no specialty arises. But when

[1] S.L.T., 1928, News, p. 93.
[2] Limited Partnerships Act, 1907, s. 5.
[3] *Swedish Central Rly. Co.* v. *Thompson*, [1925] A.C. 495; 9 Tax Cases 342.

the control is wholly abroad, it is now decided in the House of Lords that tax liability does not arise in this country merely because of the company's incorporation and registration here with the attendant statutory obligations.[1]

242. As regards the case law otherwise it seems sufficient to refer to two leading decisions in the House of Lords—the *Egyptian Hotels* [2] case and the *Swedish Central Railway* case.[3] In both cases the companies were formed, and registered, and had their registered office in England. In both cases the control was in fact wholly abroad. In the one case there was a board in London, and in the other case a committee there. In the *Egyptian Hotels* case residence in England was admitted, but it was successfully contended that the company was assessable only on so much of the profits as were remitted to this country. On the question of control the view taken was that the test is, not whether parties in this country were entitled to interfere, but whether in fact they did so.[4] It was also laid down that the trade which is to be regarded is the making of the profits, and not the disposal of them, which latter may be regulated in this country and could not be legally done elsewhere. Liability on whole profits under Case I. was accordingly negatived.

243. In the *Swedish Central Railway* case [3] the Swedish railway line had been let by the company and the question was whether the rent receivable by the company was, as a foreign possession, assessable here wholly, or only so far as remitted to this country; the latter result could not be reached unless the company resided in this country. It will be remembered that in 1925 (as now) the liability to tax on a foreign possession of the nature of rent was on the whole amount, whether brought home or not, but only in the case of a person resident in this country.[5] It was held that the company was resident here. It was not said that registration of itself would prove residence, but there were other facts which were held to establish residence, and the case was distinguished in the House of Lords in the *Egyptian Delta* case.[1]

244. In the *Egyptian Hotels* case [2] the combination of exclusive foreign trade and exclusive foreign control made the company liable to assessment, not as for trade under Case I. of Schedule D, but as for a foreign possession under Case V., notwithstanding admitted English residence; this on the authority of *Colquhoun* v. *Brooks*.[6] At the date of the *Egyptian Hotels* case liability on any foreign possession was limited to the amount of income or profit brought home. The *Swedish Railway* case resembled the *Egyptian Hotels* case inasmuch as the combination of no trade in this country and exclusive foreign control barred assessment under Case I. of Schedule D. The only assessment possible was under Case V. on a foreign possession, namely, rent. Hence

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[1] *Egyptian Delta Land and Investment Co.* v. *Todd*, [1928] W.N. 232; 44 T.L.R. 747.

[2] *Egyptian Hotels Ltd.* v. *Mitchell*, [1915] A.C. 1022; 6 Tax Cases 542.

[3] [1925] A.C. 495.

[4] *Cf.* the observations of Lord Stormonth-Darling in *Ogilvie* v. *Kitton*, 1908 S.C. 1003; 5 Tax Cases 338.

[5] See para. 219, *supra*.

[6] 1889, 14 App. Cas. 493; 2 Tax Cases 490.

residence or non-residence in Britain was vital, for in the latter case the assessment would have been limited to what was brought home, whereas in the former case the assessment was, and it was so held, on the whole rent whether brought home or not.

Section 18.—Married Women.

Subsection (1).—*General Rule.*

245. The income of a married woman living with her husband is deemed to be his income,[1] and for tax purposes this is not varied though it should be otherwise provided in any contract of marriage or in any other deed or by will. The rule, however, holds only as regards income during the marriage, so that income of the year of the marriage, before the date of the marriage, is the woman's own, and she has her own income tax rights and liabilities in regard to it; the same applies to the income in the year of the dissolution of the marriage after the date of its dissolution. As regards income received under deduction of tax at its source, those apportionments are now made according to the dates when the income is receivable, irrespective of the period of accrual.[2] The rule does not apply when the parties are not living together; in that case each spouse is treated separately, but only if the separation is what is commonly so described and appears to be permanent in character. A verbal agreement for separation has been held to be enough, and no doubt the exception would apply in cases of desertion.[3] Where the general rule of unity of the incomes for tax purposes holds, the whole tax, so far as not deducted at the source, is assessed on the husband, unless a request has been made for separate assessment as mentioned below.[4]

Subsection (2).—*Husband's Liability.*

246. Where so assessed on the husband, the whole tax is his debt, and not to any extent the wife's debt; when the husband pays it, he pays his own debt only, and neither by the Acts nor at common law has he any right of indemnity against his wife or her estate or income.[5] Cases sometimes occur where the husband has no estate and no income and is unable to pay, and the tax is lost. In such a case it matters not that the wife has other income taxed at the source,[6] and is a wealthy woman, or that husband and wife are living together in a style in accordance with the wife's means. The husband is liable to imprisonment for non-payment, but that is not often resorted to, especially if he is old; and, besides, it has to be recognised that the law is that the husband

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[1] All Schedules Rules, 16. [2] Finance Act, 1927, s. 39.

[3] *Eadie* v. *Inland Revenue*, [1924] 2 K.B. 198; 9 Tax Cases 1; *Derry* v. *Inland Revenue*, 1927 S.C. 714.

[4] See para. 250, *infra*. [5] *Re Ward, Harrison* v. *Ward*, [1922] 1 Ch. 517.

[6] *Purdie* v. *Rex*, [1914] 3 K.B. 112; cf. *Brooke* v. *Inland Revenue*, [1918] 1 K.B. 257; 7 Tax Cases 261.

has no legal means of compelling his wife to give him money with which to pay the tax.

SUBSECTION (3).—*Special Statutory Rule.*

247. In Rule 16 of "All Schedules Rules" in the Income Tax Act, 1918, it is enacted: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessed and chargeable to tax as if she were sole and unmarried. Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband and shall be assessed and charged in his name and not in her name or the name of her trustee, and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of her husband if she receives the same from or through him or from his property or on his credit."

248. This rule invites consideration. It was before the Court recently,[1] but owing to the view taken it did not require to be exhaustively dealt with. The first proviso appears to negative the main enactment when the spouses are actually living together. In the second proviso the word "property" will be noted, and with it may be taken the rule of practice that, when the husband is abroad, the wife in this country is not assessed on remittances made by him to her out of his earnings abroad.

SUBSECTION (4).—*Separate Assessment.*

249. The agitation for the separate treatment of the incomes of husband and wife has for its object the duplicating of tax allowances, and consequently the material reduction of the amount of tax payable by the household when husband and wife are living together. The only concession in that direction is the wife's earned income relief.[2] There are, however, arrangements by which husband and wife may be separately assessed, but only under the express provision that the total tax payable by both shall be the same as if the whole assessment had been made on the husband.[3] Not only so, but if the wife does not pay her tax the husband's property may be attached for it as well as for his own tax;[4] but there is no corresponding provision enabling the Department to seize the property of the wife for the husband's tax, nor is it said that proceedings must be taken against the wife's estate for her own tax before it is enforced against the husband.

250. When separate assessments are desired, notice must be given by either the husband or the wife before 6th July in the year of assessment, and it must be repeated for each year in which separate assessments

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[1] *Derry* v. *Inland Revenue*, 1927 S.C. 714.
[2] See para. 294, *infra*.
[3] All Schedules Rules, 17; Finance Act, 1919, s. 26; Finance Act, 1920, s. 25.
[4] Income Tax Act, 1918, s. 171.

are desired; but as to the year in which the marriage takes place, the notice is in time if given before 6th July in the following year. The notice requires to be in an official form and therefore inquiry should be made in ample time. It will be understood that necessarily, so far as actual assessments are concerned, the notice can have effect with reference only to income which is the subject of direct assessment, and not to income which is taxed at the source. Once the notice is given, it automatically follows that allowances and reliefs are apportioned between the spouses, by way of deduction from assessments, or by repayment, or in both ways, as the case may require. The Department may require returns of the total income from both spouses, and as to that it is not to be forgotten that there may be cases in which neither spouse is in a position to declare the full income of the other with all legal charges upon it.

SUBSECTION (5).—*Apportionment of Tax Allowances.*

251. The rules for apportionment of allowances and reliefs between the spouses where application for separate assessments has been made are the following:—[1]

Ordinary earned income relief	To husband and wife in proportion to their respective earned incomes.
Age relief	To husband and wife in proportion to their respective total incomes.
Ordinary marriage relief of £225 Allowance for children other than adopted children Rate relief, *i.e.* reduction of tax on £225 to half rate Wife's earned income relief	To husband and wife in proportion to their respective assessable incomes, that is, their incomes as ascertained under income tax rules before deduction of any allowance except the one-sixth for earned income or age relief.
Allowance for adopted children Allowance for dependent relatives Attendant daughter	To husband or wife, as the case may be, who maintains the child, relative, or daughter.
Life assurance allowance	To husband or wife, as the case may be, who pays the premium.

252. In cases of separate assessments and apportionment of allowances it may happen that the income of one of the spouses is less than the apportioned allowances; the balance is then allowed to the other spouse. Where it is only a matter of apportionment of refunds of tax it is understood that in many districts that will be made on request of the spouses at the time of the refund without any antecedent claim for separate assessments.

[1] Finance Act, 1927, Fifth Schedule, Part II.

Section 19.—Charities.

Subsection (1).—*What is a Charity?*

253. There is no general exemption of charities from income tax,[1] but the particular heads of immunity have materially extended, and now the position more nearly approaches to exemption. The first question is: What is regarded as being a charity for income tax purposes? Questions of that kind still go to the Courts, for the Acts contain no definition. It has already been stated [2] that the category of charities is not confined to schemes for the relief of indigence; it goes far beyond that; and indeed it proceeds on wholly different lines. It may be said that anything is a charity which is designed for the public benefit. Charities are classified as religious, educational, or otherwise for the benefit of the public.[3] Where, on the contrary, the objects are personal or professional, they cannot be classed as charitable,[4] unless indeed the aim comes back to the relief of indigence.

254. Before the tax reliefs available to charities can be obtained there must be some constitution of a permanent nature,[5] and the dedication of the income to purposes which the law regards as charitable must be obligatory. If these qualities are not present, it is not sufficient that in fact the money has been in any particular year, or regularly is, applied to purposes of that character. An instance of the latter kind is furnished by an *inter vivos* settlement under which the income was to be applied to charitable purposes or otherwise as the settlor should appoint.[6]

255. The following purposes have been held to be charitable: Promotion of temperance;[7] provision of sick-nursing to working-class subscribers on special terms;[8] cultivation of music among the people.[9] The fact that members of the society enjoy incidental benefits is not fatal.[10] On the other hand the following have been refused relief on the ground that the professional element predominated. The Royal College of Surgeons, Edinburgh;[11] the Juridical Society of Edinburgh;[12] and the British Medical Association.[13] Although a society is recognised as a charity and obtains exemption on, *e.g.* the income tax from its

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[1] *Brighton College* v. *Marriott*, [1926] A.C. 192; 10 Tax Cases 213.

[2] See para. 96, *supra*.

[3] *Commissioners for Special Purposes* v. *Pemsel*, [1891] A.C. 531; 3 Tax Cases 53.

[4] *Farmer* v. *Juridical Society*, 1914 S.C. 731; 6 Tax Cases 467.

[5] Income Tax Act, 1918, s. 37 (1) (*b*); *Birkenhead School, Ltd.* v. *Dring*, 1926, 43 T.L.R. 48; 12 Tax Cases 273.

[6] *Ex parte Rank's Trs.*, 1922, 38 T.L.R. 603; 8 Tax Cases 286.

[7] *Inland Revenue* v. *Falkirk Temperance Café*, 1927 S.C. 261; 11 Tax Cases 353; cf. *Inland Revenue* v. *Temperance Council of Christian Churches*, 1926, 42 T.L.R. 618; 10 Tax Cases 748.

[8] *Inland Revenue* v. *Peeblesshire Nursing Association*, 1927 S.C. 215; 11 Tax Cases 335.

[9] *Inland Revenue* v. *Glasgow Musical Association*, 1926 S.C. 920; 11 Tax Cases 154.

[10] *Inland Revenue* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611.

[11] *Sulley* v. *Royal College of Surgeons, Edin.*, 1892, 19 R. 751; 2 Tax Cases 149.

[12] *Farmer* v. *Juridical Society*, 1914 S.C. 731; 6 Tax Cases 467.

[13] *General Medical Council* v. *Inland Revenue*, [1928] W.N. 98.

investments, it does not follow that the money is in like manner exempt in the hands of those to whom it is paid as salaries or otherwise. Thus a church organisation enjoys exemption of this nature, but the salaries which it pays or augments out of that money to the ministers and officials of the church are of course assessable income in their hands.

Subsection (2).—*Extent of Exemption.*

256. As to the extent of the tax exemption enjoyed by charities it would, it is thought, be correct to say that it is universal, except as regards the profits of any trade carried on by the charity and of which it cannot be predicated, either that the trade is exercised in the course of the actual carrying out of a primary purpose of the charity, or that the work in connection with it is mainly carried on by beneficiaries of the charity.[1] Taking the reliefs in detail, they cover the following, assuming that the occupation or income is applied solely to the purposes of the charity: (1) Exemption under Schedule A on lands and buildings owned and let by the charity;[2] (2) exemption under Schedule A on lands and buildings owned and occupied by the charity, unless the property is in the use and enjoyment of a person whose total income is £150 or more (1921 Act, s. 30); (3) exemption on all ordinary investment income (Income Tax Act, 1918, s. 37); the reference being to "yearly interest," it is not technically sufficient to cover such income as interest on bank deposits, but that is conceded; (4) exemption under Schedule B on lands occupied by the charity whether for farming or any other purpose, but in the case of farming only if the farming operations are mainly carried on by beneficiaries of the charity; this may, however, now be widened if the farming is assessed under Schedule D (1921 Act, s. 30); (5) exemption of profits of trade if either the trade is carrying out a primary purpose of the charity or the work is mainly done by beneficiaries of the charity (1927 Act, s. 24). The first limb of this relief covers two special cases which attracted considerable public attention: (*a*) Agricultural shows conducted by agricultural societies, a case, however, which had already been specially dealt with in s. 23 of the Finance Act, 1924, and (*b*) surpluses on the finances of public schools as to which the law had refused exemption.[3] (6) Where the charity is entitled to the yearly profits of a business carried on by third parties, those profits are exempt as "annual payments forming part of the income" of the charity;[4] (7) where there is a legacy to a charity of the whole or part of the residue of the testator's estate, and distribution does not take place, or is not complete, at the end of a year after the testator's death, the tax on the income after that year, so far as the income goes to the charity, will be refunded (1922 Act, s. 30). It will, however, be understood that, notwithstanding all exemption rights, a

[1] Finance Act, 1927, s. 24. [2] Income Tax Act, 1918, s. 37.
[3] *Brighton College* v. *Marriott*, [1926] A.C. 192; 10 Tax Cases 213.
[4] *Ex parte Shaftesbury Homes*, [1922] 2 K.B. 729; 8 Tax Cases 367.

charity must pay over to the Exchequer all tax deducted by the charity on the payment of ground burdens, interest, annuities, and other payments.

Section 20.—Special Claims for Expenses.

Subsection (1).—*Investment Companies.*

257. Section 33 of the Income Tax Act, 1918, provides for relief to (1) life assurance companies; (2) companies whose business consists mainly in the making of investments and the principal part of whose income is derived therefrom; and (3) savings banks in respect of their expenses of management. It seems sufficient here to deal with the second class of company referred to in s. 33. The occasion for the enactment was that rents, interests, and dividends are specific subjects of assessment, profits or no profits, and that the Department has the option to charge a company, either under Case I. of Schedule D on profits, or under other Cases of that Schedule on those specific heads. It might thus happen that a company was charged on rents, interests, etc., without any allowance for the expenses of management of the company.

258. This origin of the relief is obvious in conditions attached to the relief. The conditions are (1) that the company has in the tax year in question been charged by deduction or otherwise, *e.g.* under Cases III., IV., V., or VI. of Schedule D, or all of them; (2) that in the same year the company has not been charged under Case I. of Schedule D (profits); (3) the relief shall not be so large as to make the company's tax less than if the profits had been charged under Case I., including rents;[1] (4) income or profits from sources not charged to tax must be deducted from the expenses of management; (5) no relief is allowed under s. 33 in respect of expenses which may be included in an excess maintenance claim under Schedule A.[2] On the second of these conditions it is suggested officially that the existence of some trivial partial assessment under Case I. of Schedule D is a legal bar to any claim at all under s. 33. In such cases repayment is made though it is called a concession, but it is submitted that that is not the effect of the language of the section and that the claim is good in law. The third condition is important; it is equitable, for it is designed to carry out the conception and purpose of the relief, namely, to remove any hardship from assessment otherwise than under Case I. The condition requires that the company's whole income shall be marshalled, including the gross sums of items taxed by deduction and all rents received.[1] The fourth condition is often a serious rider upon, or even a bar to, any claim under the section. It refers to items of "income or profits derived from sources not charged to tax," and it requires that those items shall be deducted from the expenses of management in respect of which the claim is put forward. In result this is the same as if it had been directed under the third

[1] *Rosyth Building and Estates Co. Ltd.* v. *Rogers*, 1921 S.C. 372; 8 Tax Cases 11.
[2] See para. 137 *et seq.*, *supra*.

condition (proviso (*a*) to s. 33) that those items of income or profits should for this purpose be deemed to be chargeable to tax under Case I. Take the case of a mortgage company which is not a company for the purpose of dealing in investments. In the case of such a company an occasional surplus on a foreclosed property would not be assessable. Neither does it become assessable under s. 33, but it must be deemed to be assessable if a claim for expenses is put forward under that section. If the ordinary income were £1000, expenses of management £300, foreclosure surplus £300, no claim would lie under s. 33. The fifth condition is merely an instance of the obvious, namely, that the same claim cannot be made twice.

259. A claim under this section does not exclude a bank interest claim. A foreign company may claim.[1] Among items of expenses which may be founded on are directors' fees and auditors' fees; salaries of officials and other employees; rent of offices; annual value of offices, if the property of the company; losses on exchange usually but not always; [2] commissions; but not any items not actually paid out.[3]

Subsection (2).—*Mineral Rights.*

260. By s. 26 of the Finance Act, 1922, relief is given in respect of expenses of management and supervision "wholly, exclusively, and necessarily disbursed" in any year in which the minerals are let. The section does not apply when the owner of the minerals is working them; it is not then necessary, for he is carrying on a trade, and those expenses will be deductions under Case I. of Schedule D. The claim cannot exceed the tax due by him on the mineral income.

Subsection (3).—*Patent Rights.*

261. In this case there is no statutory provision, but in practice relief is given on the same principle as in the case of mining royalties. If the royalties have been received under deduction of tax, relief is given for necessary expenses of maintaining the patent, but not litigation expenses.

Section 21.—Free of Tax.

Subsection (1).—*Statutory Nullity.*

262. Rule 23 of the rules applicable to all Schedules in the Income Tax Act, 1918, provides that "every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction [*i.e.* of tax authorised by this Act] shall be void." Three things stand out on this enactment: (1) What is annulled is not the obligation for payment of interest, etc., but the condition that the payment shall be without

[1] *Equitable Life Assurance Society of U.S.* v. *Hills*, 1924, 131 L.T. 480; 8 Tax Cases 657.
[2] *Bennet* v. *Underground Electric Railways*, [1923] 2 K.B. 535; 8 Tax Cases 475.
[3] *North British and Mercantile Insurance Co.* v. *Easson*, 1919, 7 Tax Cases 463.

deduction of tax;[1] (2) it applies to contracts only, and therefore not to wills;[2] (3) it applies only to "annual payments," which, however, is an expression requiring construction.[3] It does not seem to have been decided whether purely gratuitous *inter vivos* donations fall under the voiding enactment as regards any free-of-tax condition as being "agreements." A contractual will apparently would do so; revocable provisions in a marriage contract in favour of parties beyond the marriage consideration apparently would not; nor it is thought would donations *mortis causa*. In cases of contract the objection is not avoided by a separate clause covenanting to pay the tax; in any case that would be only a partial remedy, for there would still remain the tax on the amount of the tax; but it is wholly ineffectual as falling under the statutory nullity.[4] This is a far-reaching principle, which it is thought is not generally appreciated or known. It may be added that the statutory nullity appears to be only an expression of the common law.[5] Indeed it may be that the statute restricts the common law, for the latter would probably reach bequests also.

263. When errors have been committed either way, by deducting tax when it ought not to have been deducted, or *vice versa*, there are decisions allowing, and others disallowing, rectification. When tax had been wrongly deducted from an annuity for a number of years, the annuitant recovered the short payments with interest, less tax, on the interest.[6] In converse cases the debtor has been refused any remedy for the past because the non-deduction of tax was an error in law;[7] or has been allowed to rectify the past out of future payments,[8] or has been allowed that remedy only as regards tax on arrears due by him for the past.[9]

Subsection (2).—*Application to Contracts.*

264. If there is an obligation in a bond to pay interest "without deduction of income tax," the condition as to non-deduction of tax is void,[10] and if the interest is in fact paid without deduction of tax, the Department will not recognise any claim by the creditor for any repayment of tax which has in fact not been borne. If, again, the obligation were to pay interest "without deduction," that would not be an agreement to pay free of tax, for income tax is technically not a deduction.[11] Yet Rule 23 does not in substance achieve its purpose, for in order

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[1] *Howe* v. *Synge*, 1812, 15 East 440. [2] *Kinloch* v. *Kinloch*, 1880, 7 R. 596.
[3] *Smith* v. *Smith*, [1923] P. 191; *Bayley* v. *Bayley*, [1922] 2 K.B. 227.
[4] *In re Gretton's Indenture; Re Radcliffe and Brickman's Trusts; Hood* v. *Byron*, [1923] 1 Ch. 77; *Gaskell* v. *King*, 1809, 11 East 165; cf. *Edinburgh Corporation* v. *Lord Advocate*, 1923 S.C. 112 (nullity not pleaded).
[5] Bell's Prin., s. 42. [6] *Murdoch's Trs.* v. *Murdoch*, 1918, 55 S.L.R. 664.
[7] *Hatch* v. *Hatch*, [1919] 1 Ch. 351.
[8] *Machell* v. *Parry*, [1916] 2 Ch. 417 (trustees and beneficiary).
[9] *Shrewsbury* v. *Shrewsbury*, 1906, 23 T.L.R. 100.
[10] *South American Stores, Ltd.* v. *Inland Revenue*, 1926, 12 Tax Cases 905.
[11] *Lund* v. *Liverpool School for the Blind*, [1898] 2 Ch. 669.

to get round it when, say, it is desired to get 5 per cent. free of tax, all that is necessary is to make the obligation run to pay interest "at such a rate as, after deduction of income tax at the standard rate for the time, shall leave a rate of 5 per cent."; [1] but if it were a heritable security in Scotland, that form would be objectionable as not being precise, and thus failing to create a valid security for the interest. An agreement between landlord and tenant that the latter should for some terms pay rent in full, and leave over his right to deduct the Schedule A tax, was held not to be void under this rule. The intention being, not that the tenant should bear the tax, but only that his relief from it should be postponed, the arrangement was regarded as amounting to a loan by him to the landlord.[2] An entirely exceptional case is that of the tax-compounded 4 per cent. war loan and bonds. The 4 per cent. is paid without deduction of tax; in all statements of total income the interest has to go in at the gross sum which, after deduction of tax at the standard rate, would leave 4 per cent., but no repayment can be obtained of that tax.[3] Thus at present with tax at 4s. the holder of £10,000 of that security returns his income from it as £500, which, after deducting tax at 4s., results in the £400 that he actually receives. This £500 counts as part of his total income, *e.g.* for super-tax and sur-tax, and also for ascertaining the amount of life premiums on which he may obtain allowances, but that allowance, and all other allowances, must be satisfied out of tax borne on other income, and if the latter tax is not sufficient, then to that extent the allowances are lost.

Subsection (3).—*Apparent Exceptions.*

265. In some cases it might not be too much to say that the Courts are disposed to be astute to sustain reasonable agreements as they stand and without holding them to be null as regards a condition for non-deduction of tax. This aspect of the matter was very pointedly discussed in the House of Lords in a case [4] where, in connection with divorce proceedings, the wife had contracted to pay to her husband one-fourth of certain income, with a minimum, without deducting income tax from it. The share falling below the minimum, the question arose whether the free-of-tax condition was valid. It was held that it was valid, on the view, apparently, that it was an arrangement for partition of what remained of the income of a specific fund after tax had been fully paid on that income. The Lord Chancellor distinguished agreements to allocate a certain share of profits or a fixed sum out of profits without deducting tax, both of which would be void as to the tax condition, and, on the other hand, agreements to make the like allocations after deduction of tax, which would be unobjectionable. But that case was distinguished in a case where as part of the compromise of a litiga-

[1] *Burroughes* v. *Abbott*, [1922] 1 Ch. 86; *Booth* v. *Booth*, [1922] 1 K.B. 66.
[2] *Lamb* v. *Brewster*, 1879, 4 Q.B.D. 607.
[3] Income Tax Act, 1918, s. 48.
[4] *Brooke* v. *Price*, [1917] A.C. 115.

tion there was an agreement to pay a fixed sum annually out of the estate; it was held that the obligant was entitled to deduct tax.[1]

SUBSECTION (4).—*Statutes and Judicial Orders.*

266. Rule 23 refers only to agreements, leaving out of view, not only wills, but also other Acts of Parliament and orders of Court. An Act of Parliament providing an annuity "free from all taxes," etc., was held to entitle the annuitant to the annuity free of income tax.[2] The special Act was passed in 1871, and the general enactment then in force was contained in the 1842 Income Tax Act; but apart from that relation of dates the point is that the statutory rule annulling free-of-tax conditions applies to agreements only. As to orders of Court decreeing payments free of tax, or directing the execution of deeds to the same effect, it has to be kept in view that orders of Court are not, or not always, agreements,[3] that the Court has power to order payments free of tax and that these be secured by deed, that an order for execution of a deed securing a sum free of tax may mean that such technical form shall be adopted as shall validly carry out the order, and that, if that be not done, the Court may order that the mistake be rectified.[4] The English view is that when, either expressly or in fact, the amount of aliment has been arrived at on a computation of net income after deducting tax, the aliment is payable without deduction of tax.[5]

SUBSECTION (5).—*Dividends.*

267. Dividends free of tax are very common, both on preference shares and ordinary shares. In the case of ordinary shares it is manifest that there is no question of conflict with Rule 23; there is no "agreement," for the vote declaring the dividend cannot be so described, it is merely a domestic arrangement as to how much of the profit shall be divided after paying all the income tax. In the case of preference shares the free-of-tax benefit is agreed in the terms of issue, but the holders are members of the company as much as ordinary shareholders, and it is still a domestic arrangement for the apportionment of so much of a fund on which tax has been paid. In both cases the tax-free benefit is just so much more dividend. Thus when a company was by Act of Parliament restricted to a 10 per cent. distribution, it was held not to be entitled to pay 10 per cent. free of tax.[6] In the case of all free-of-tax dividends, the dividend warrant must shew the gross amount of dividend, the rate and amount of tax deducted, and the net dividend.[7]

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[1] *Smith* v. *Shaw*, [1918] P. 47; *Campbell* v. *Campbell*, [1922] P. 187.
[2] *Duke of Argyll* v. *Inland Revenue*, 1913, 109 L.T. 893; 7 Tax Cases 225.
[3] *Smith* v. *Shaw*, *supra*.
[4] *Burroughes* v. *Abbott*, [1922] 1 Ch. 86.
[5] *Smith* v. *Smith*, [1923] P. 191.
[6] *Attorney-General* v. *Ashton Gas Co.*, [1906] A.C. 10.
[7] Finance Act, 1924, s. 33.

Subsection (6).—*Annuities.*

(i) *Contractual Annuities.*

268. It is in relation to annuities that there is seen the importance of the fact that Rule 23 of the "All Schedules" Rules in the Income Tax Act, 1918, deals with agreements only. So far as annuities rest on contract, the technical position in relation to a free-of-tax condition is precisely the same as in the case of interest.[1] A bond for an annuity "free of tax," or "without deduction of tax," would be valid for the annuity but void as to the tax, with the consequences that heritable security constituted for the annuity would be effectual, and that the stamp should be calculated on the annuity only without any addition for tax. It is known that some insurance annuities were issued on the free-of-tax basis, but such a thing is now unknown. If it were intended, the formula would require to be "an annuity of such amount as, after deduction of income tax at the standard rate for the time, shall leave a clear annuity of £ ." The stamp would require to be calculated on an unknown gross sum, and any heritable security would be invalid as lacking precision.

(ii) *Testamentary Annuities.*

269. The practical question regarding annuities is limited to the case of testamentary gifts of annuity. A provision of the liferent of an estate free of tax is unlikely to occur, but it is not uncommon to have tax questions regarding limited rights of liferent or use, *e.g.* of a residence, and cases of general liferents restricted or expanded by maximum or minimum limits; and it is necessary to keep in view that annuities must be satisfied out of capital if the income is insufficient, in which case any additional gift of tax immunity would also require to come out of capital. As the "voiding" Rule 23 does not apply, all that is required is that the intention to make the bequest free of income tax shall be clear. Thus a bequest of "an annuity of £100 free of income tax" is unobjectionable. Yet even here certain matters call for attention. If the testamentary scheme included a direction that, say, the residuary legatee, or the successor in specific heritage, should grant to the annuitant a bond of annuity, it would be at least expedient that the direction should be as expressed in the preceding paragraph. Even then, if there is to be heritable security, a serious difficulty appears to arise whether the grant of that security is left to be created by the successor or is contained in the will. Again, if the bequest of the annuity is in full of legal rights, or under any other condition importing the surrender of some other right by the annuitant, it appears that the acceptance of the annuity amounts to a contract between the annuitant and the trustees, and so the tax-free benefit may be doubtful under

[1] See para. 264, *supra.*

Rule 23. The risk can be obviated by framing the benefit in the terms suggested above.[1]

(iii) *Construction of Bequests.*

270. A great variety of questions has arisen as to whether the language used in wills amounted to a direction that an annuity should be free of income tax. The various decisions may not all be easy to be reconciled, but the following rules are clear: (1) It is not necessary that "income tax" shall be expressly mentioned,[2] but (2) it is not sufficient that the annuity is described as "free" or "clear";[3] nor (3) that it is directed to be paid "without deduction,"[4] but (4) if the testator directs one annuity to be paid "free of all deductions except income tax," and another to be paid "free of all deductions," the latter is held to be tax-free.[5] The first of these rules postulates that there shall be words freeing the bequest from "taxes" generally, and there is then no reason for differentiating against income tax; but it has been held that "free of all duties" is not sufficient,[6] because its natural reference is to death duties, and income tax is not commonly spoken of as a duty, though that is its technical quality and it so figures in the preamble to every Finance Act. The second rule proceeds on the view that the language referred to may be satisfied by exempting the bequest from trustees' costs, which with deference does not seem a strong argument. The third rule rests on the technical basis that income tax is not a deduction from the gift, but is a personal liability of the donee on account of the gift, notwithstanding that the consequence is that the payer of the annuity then makes payment under deduction of the tax. But if the testator chooses to set up his own vocabulary and to class income tax as a deduction, then, when he gives an annuity free of all deductions, it is free of income tax, and that explains the fourth rule.

271. There are several recent cases in Scotland on the construction of testamentary annuities with reference to income tax. In *Murdoch's Trs.*[7] there was a liferent to a widow with a restriction that if the income of the free residue in any year exceeded £2000 the payment to the widow out of that income was to be restricted to £2000, and it was held that this meant £2000 free of tax if the income was sufficient. In *Smith's Trs.*[8] there was a gift of £750 yearly out of the net annual proceeds of one-half of the estate, and it was held that this meant £750 free of tax. In *Wilson's Trs.*[9] there was a gift up to, if possible, £600 a year to cover all rent, rates, and taxes, and it was held that this meant £600 less tax.

(iv) *Repayment of Tax.*

272. Until comparatively recently the Department would not allow any repayment claim by a tax-free annuitant. The refusal was based

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[1] See para. 268, *supra.*
[2] *Bannerman* v. *Young*, 1882, 21 Ch.D. 105.
[3] *Dalrymple* v. *Dalrymple*, 1902, 4 F. 545; *Farrer* v. *Loveless*, [1918] 2 Ch. 1.
[4] *Machell* v. *Parry*, [1916] 2 Ch. 417.
[5] *Williams* v. *Marson*, [1894] 1 Ch. 286.
[6] *Pratt* v. *Gamble*, [1917] 2 Ch. 401.
[7] *Murdoch's Trs.* v. *Murdoch*, 1918 S.C. 738.
[8] *Smith's Trs.* v. *Gaydon*, 1919 S.C. 95.
[9] *Wilson's Trs.* v. *Wilson*, 1919 S.C. 359.

on the argument that the annuitant had borne no tax. But now that practice is reversed, and such annuities are, for all income tax purposes, treated exactly like tax-free dividends. So when tax is 4s. a tax-free annuity of £400 ranks as a gross annuity of £500, and it is admitted by the Department that the annuitant has suffered £100 of income tax. Incidentally this pays the Department better on super-tax in the case of large annuities. But the position is not so clear as between the annuitant and the trustees or other payer of the annuity. It has been held in England that the benefit of any tax refund which the annuitant may obtain, or a proportion of it according to circumstances, must be communicated by him to the trustees or other payer,[1] and if the annuitant does not voluntarily claim repayment, he will be ordered by the Court to do so.[2] Assuming this to be law in Scotland many questions arise, some of which, it is thought, are not yet receiving full consideration. A question of the duty of trustees is at once raised, and that whether the annuitant resides in Scotland, or in England, or (subject to what is stated below) elsewhere. *Per contra* the English law would, no doubt, be applied against a Scottish annuitant as regards an annuity derived from England. Then it is for consideration whether this alleged liability on the annuitant to communicate tax refunds ought not to be negatived in wills; to enforce the liability places a difficult and unpleasant duty on trustees; besides, in some cases it may abolish, and in all cases it must diminish, the difference between the effect of an annuity tax-free and one subject to tax.

273. Under the rule of the English cases cited peculiar positions may arise: (1) The annuitant may be a married woman, and then her husband's whole income tax position will be brought under review; (2) her whole other income may be from war loan and received without deduction of tax, and the net position may be that that exemption satisfies her whole reclaim rights, in which case apparently there would, after all, in effect require to be a deduction of tax from the annuity; (3) the annuitant may be or become, say, a United States citizen resident in that country, with no right to any tax allowances in this country; or (4) a British subject resident abroad with qualified right to allowances; (5) the annuitant may sell the annuity to a company, which, again, has no right to personal allowances. A clause in a will stating that all refunds of tax should be for the annuitant's own benefit might be held to enlarge the bequest, and it might then depend on the terms of the will whether that additional benefit was also free of income tax and shared in any clause exempting the annuity from death duties. The rule becomes still more exacting when super-tax also is in question.

Subsection (7).—*Tax-free Salaries.*

274. This subject has been discussed above.[3]

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[1] *Le Fevre* v. *Pettit*, [1922] 2 Ch. 765.

[2] *Public Trustee* v. *Day*, 1922. See Murray and Carter on Income Tax, 11th ed., p. 378.

[3] See para. 228, *supra*.

Section 22.—Bank Interest Paid.

275. The claim for refund of tax dealt with in this section is commonly referred to as a bank interest claim, but it goes further. The claim is based on s. 36 of the Income Tax Act, 1918. The necessity for that section turns on the distinction between "annual" interest and other interest, the fact that it is only from "annual" interest that the payer is entitled to deduct tax, and the practice of banks to charge all interest without deduction of tax. Where the debtor was not entitled to deduct tax on paying the interest, there was previously no claim by the payer for any refund or indemnity. Sec. 36 of the Income Tax Act, 1918, grants relief by repayment. It is expressed to apply to the following cases where the interest is paid without deduction of tax out of income which has borne tax: (1) Interest, not limited to non-annual interest, payable in the United Kingdom to a bank carrying on a *bona fide* banking business in the United Kingdom; (2) non-annual interest payable in the United Kingdom to a person who is *bona fide* carrying on business as a member of a stock exchange in the United Kingdom; (3) non-annual interest payable in the United Kingdom to a person *bona fide* carrying on the business of a discount house in the United Kingdom. In addition, it is known that in practice the section has been extended to interest on an advance made by solicitors. It is said that it is not extended to transactions with outside brokers, moneylenders, or private persons. But as to this last it will be observed that the section does not say that, in the case of advances from "a person" who is carrying on a stockbroking business, the advances must have been for stock exchange purposes. In no case is it said that advances must have been obtained, or be repayable, in the United Kingdom. Interest payable to an office in the United Kingdom of a dominion or foreign bank is within the section; interest payable to a dominion (*e.g.* in the Channel Islands) or foreign office of a United Kingdom bank is not. Contango charged by a stockbroker is not regarded as within the relief. Subject to the point that the statutory relief in the case of bank interest is not dependent on its being non-annual interest, reference is made to the undernoted cases on the question of the existence or non-existence of right to deduct tax on payment of the interest.[1]

276. Two important questions are (1) against what income is the bank interest to be placed? and (2) at what rate is the repayment of tax to be made? The importance of the first of these questions is that if the interest is placed against earned income—say, the profits of a business—the relief to the taxpayer is diminished by the diminution of his earned income relief, unless he is still entitled to the maximum £250. This question is disposed of according to the facts of each particular case, and usually there is not much difficulty in getting at the

[1] *Goslings & Sharpe* v. *Blake*, 1889, 23 Q.B.D. 324; 2 Tax Cases 450; *Inland Revenue* v. *Hay*, 1924 S.C. 521; 8 Tax Cases 636; *De Peyer* v. *The King*, 1909, 100 L.T. 256.

facts sufficiently. The question cannot arise at all if the taxpayer has no business or earned income; nor in the case of a company, for companies do not obtain any earned income relief. In the case of an individual it will generally be reasonably clear whether the loan was obtained for the purposes of a business. If it was, the usual course is to debit the interest as a business outgoing; that reduces profit and reduces earned income relief, and obviates any repayment claim under s. 36. But even in a business case, if the income includes interest received without deduction of tax, no objection is in practice taken to deducting from that credit item any interest paid without deduction of tax. If the loan was obtained for stock exchange transactions or to finance purchases, the interest on it, paid without tax deduction, will not be used to reduce the earned income relief.

277. So far, in dealing with business cases, it has been assumed that proper accounts are shewn; but if it comes to a case where these are absent, and an assessment figure of profits has to be arrived at as best may be, the taxpayer is penalised by the assumption that the figure which is adopted is after the debit of all possible outgoings, including any interest, and therefore no claim under s. 36 will be entertained. But that practice rule is not applied against farmers assessed under Schedule B on the statutory basis of a year's rent. It might equally be said that in reaching that basis it is assumed that all outgoings, including interest, have been deducted; but Schedule B is not so administered, and a claim under s. 36 will be entertained.

278. The rate at which the relief will be given depends on what is the highest rate of tax borne by the claimant and not exhausted by other reliefs; it is not determined by what may happen to be the rate borne on the income against which the interest is placed. An adjustment may require to be made for Dominion tax relief.

Section 23.—Trusts for Accumulation.

279. Speaking generally, tax allowances are available only to individuals, and only on income which they receive beneficially, and not to associations of persons, nor to trustees except as on behalf of beneficiaries. Any income which is, and remains, "trustees' income" does not obtain ordinary reliefs, and thus in a sense is largely lost. Examples of this are seen in cases of accumulation of income in the hands of trustees, whether under the directions of testators or settlors, or by operation of law, as in the case of certain mineral rents and royalties. A very common case is a testamentary or *inter vivos* settlement for children who shall attain majority, or, being daughters, marry under that age, with power to the trustees, till the capital becomes payable, to apply the whole or part of the income for the maintenance and education of the children. Under such trusts it always has been the practice to admit repayment claims on behalf of the children, but only on such part of the income as has been applied for their benefit re-

spectively under the power; and that practice continues even though the statutory provision mentioned below may not apply. Further, it being of course assumed that the money applied is that of taxed trust income, the relief obtained is calculated on the gross amount which, after deduction of tax, leaves the net sum applied. Thus, if the sum actually applied is £100, that is equal to £125 gross trust income when tax is 4s., and assuming that the beneficiary has no other income, he will be entitled to total exemption, and will year by year obtain a tax refund of £25. If the sum actually applied is £288 a year, that is equal to £360 gross trust income, and, on the same assumption, the beneficiary will year by year obtain the full personal allowance of £135 and the full rate relief on £225, the refund being £49, 10s. It is important to note that in such a case it can rarely happen that the beneficiary can obtain any further benefit from the statutory relief under s. 25 of the 1918 Act. But in cases of applications of smaller sums year by year, or of no sums at all, any further refunds which might have been obtainable, if the children had been absolutely entitled to the whole income, were lost, except for the three years prior to vesting.

280. The case just stated is typical of the kind of case provided for in what is now s. 25 of the Income Tax Act, 1918, which is in the following terms: "Where, in pursuance of the provisions of any will or settlement, any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income, and the income from any other fund subject to the like trusts for accumulation, and of the total income of that person from all sources (hereinafter referred to as "the aggregate yearly income") is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within six [1] years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year; but in calculating that sum a deduction shall be made in respect of any relief already received."

281. Care is required to secure that the claims are not shut out by the time limit. The material point is not the treatment of income by obligatory accumulation, but the entirely different consideration whether the interest of the claimant was, during the accumulation, absolute or contingent. If it was absolute, then, notwithstanding the direction for accumulation, claims must be made within six years after the expiry of the year of assessment within which the income arose.[2] The

[1] Finance Act, 1923, s. 30 (2).

[2] *Stoneley* v. *Ambrose*, 1925, 133 L.T. 233; 9 Tax Cases 389; *Roberts* v. *Hanks*, 1926, 134 L.T. 754; 10 Tax Cases 351; *Inland Revenue* v. *Blackwell*. [1926] 1 K.B. 389.

contingency to which the section refers relates to the income, not to the capital of the fund; the right to the latter may be contingent, yet the former may be vested in right though subject to obligatory or discretionary accumulation. Though the trustees are entitled to expend all the income, the result under the trusts may be that, so far as it is not applied but is accumulated, the right of the expectant beneficiary to the accumulation is contingent, and therefore within the section. It may often be difficult to decide whether the case is within the section or not; in such a case it is suggested that a claim should be sent in on the assumption that the right to the income is absolute. The result will probably be, either that the claim is admitted, or that an arrangement is arrived at with the Department that the time limit will not be pleaded against a claim within the six years after the end of the tax year in which the accumulation ends. Even then, however, it will be noted that the claimant may suffer a considerable loss of interest.

282. The section is limited to accumulation in terms of wills and settlements, but a settlement may be very informal.[1] The words in the section are "contingently on his attaining some specified age or marrying"; there is here no particular reference to majority, and that is not to be read in. If the condition is stated in the alternative, obviously the reference to marrying must mean marrying under the specified age.[2] The contingency must be age or marriage, or these in the alternative; no other condition will bring the section into operation. Further, if any other condition with regard to vesting be superadded, the case is not within the section.[3] If the direction be to accumulate for twenty years and then to pay to X, no doubt he will then have attained a certain age, but it is not a "specified age" within the section.[4] As to the ultimate interest of the beneficiary, all that the section requires is that the income shall be under accumulation "for the benefit" of that person. It is not said that he must then be entitled to the capital of either the original fund or the accumulation, and it is enough if he then becomes entitled to the income of the accumulation.[5]

Section 24.—Schemes for Avoidance of Tax.

283. An abuse had crept in of allowing temporary and revocable trusts and other arrangements to avoid and reduce income tax and super-tax, even where the beneficiaries were children whom the settlor was legally liable to maintain. A check was put on this by s. 20 of the Finance Act, 1922, and such arrangements do not now hold good in the following cases: (1) Where the settlor is entitled to bring the trust or arrangement to an end at his pleasure without the consent of any person, or where the only consent required is that of the settlor's wife

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[1] *Roberts* v. *Hanks*, 1926, 134 L.T. 754.
[2] *Stoneley* v. *Ambrose*, 1925, 133 L.T. 233; 9 Tax Cases 389.
[3] *Inland Revenue* v. *Bone*, 1927 S.C. 698. [4] *White* v. *Whitcher*, 1927, 44 T.L.R. 113.
[5] *Dale* v. *Mitcalfe*, [1927] 2 K.B. 491; affd. [1928] 1 K.B. 383.

or husband and they are not living apart. If the trust or arrangement is revocable by the wife or husband of the settlor, that is regarded as equivalent to the settlor having the revoking power; (2) where the trust or arrangement was set up after 1st May 1922, was not entered into for valuable and sufficient consideration, and its duration "cannot" exceed six years. In these two cases it does not matter who are the favoured parties or what is their relationship, if any, to the settlor. But there is a third case in which also the trust or arrangement fails of effect, viz. (3) where it was set up after 5th April 1914, is for the benefit of a child of the settlor, and is to hold for some time less than the child's whole life; but to this third case there are a good many exceptions. The trust or arrangement works effectively for its intended tax purposes (*a*) if or when the child is major or married; or (*b*) even in minority if the capital is to go to the child at the end of the period of enjoyment of the income; or (*c*) if the income provision is for the settlor's whole life. "Child" includes stepchild and illegitimate child, but not grandchild.

284. Even though the trust or arrangement fails for tax purposes that does not otherwise render it ineffective, and s. 20 of the 1922 Act makes provision for that case. For tax and sur-tax purposes the income is held to be the income, not of the intended beneficiary, but of the settlor if living. That increases his tax liabilities and may render him liable to sur-tax; but in cases (2) and (3) stated in the preceding paragraph the settlor is entitled (not bound) to claim back from the beneficiaries a share of the tax and super-tax paid by him, and this no matter how small the beneficiary's income may be. On the other hand, if in these cases (2) and (3) the settlor obtains any additional relief to which he would not have been entitled if the income had been treated as belonging to the beneficiary, he must hand it over to the latter.

285. What has happened is that the provisions in s. 20 of the 1922 Act have been utilised as guides in all manner of circumstances. A common case is where the settlor or obligant has been in the habit of materially aiding a relative and means to continue to do so; in that case it is felt that there is no reason of any kind why this should not be done in a manner which will give taxation relief. But the section is being applied far beyond cases of that kind, and it can be said that the Act has almost invited such arrangements even within the household. Viewing the matter constructively to see what will and what will not be effectual: (1) If a power of revocation is reserved to the settlor alone, or with consent of his or her spouse, or to the other spouse, the scheme is wholly ineffectual for tax relief; but that would not be so if the scheme consisted of two parts applicable to two periods, the earlier period being such as would comply with the Act and the scheme being irrevocable as regards that period, and the power of revocation applying to only the later period; (2) if the beneficiary is a child or stepchild of the settlor, and even though there is no power of revocation,

the scheme is ineffectual for tax relief unless it is to endure for the whole life of either the settlor or the child. But to this there are the exceptions stated above. (3) In all other cases (*i.e.* other than minor and unmarried children or stepchildren) the scheme is effectual to avoid tax unless it is from the beginning set up for a period which "cannot" exceed six years. Thus the following would be effectual (*a*) for seven years or the settlor's life, whichever may be the shorter; (*b*) for seven years or the beneficiary's life, whichever may be the shorter; (*c*) for seven years or the joint lives of the parties, whichever may be the shorter; (*d*) for seven years or till death or marriage.

286. These schemes may be carried out, with or without security, by conveyance, transfer, trust, obligation, or agreement. Trustees are not necessary. The document must be properly stamped; a sixpenny stamp as for an agreement is not to be relied on; but it is not necessary to incur either annuity stamp or, unless there is security, mortgage stamp. In England the document ought to be under seal. Care must be taken to have evidence of delivery, especially in the case of pupil children where the form is such that there is no infeftment or registration as a shareholder; there may be such cases where it will hardly be safe to dispense with trustees.[1] These schemes achieve the best results when the settlor is liable for sur-tax and the beneficiary has little or no other income. The amount provided is a deduction from the settlor's income; whether it is expressed to be payable under deduction of tax or free of tax, it does not reduce the settlor's income tax liability, but it does reduce his sur-tax liability, and that is one part of the gain. The other part of the gain is that the money is now legal income of the beneficiary, who is thus able to obtain a tax refund. It has to be remembered that consequences in the other direction are that there may be lost the allowances for children and dependent relatives, for they will probably then have incomes exceeding £60 and £50 respectively.

Section 25.—Double or Multiple Taxation Relief.

Subsection (1).—*The Irish Free State.*

287. Arrangements [2] have been made with the Irish Free State for granting relief in respect of liability to both British and Irish Free State tax and sur-tax. This relief is not the same as in the case of other Dominions. The arrangement recognises that taxpayers may be in any of the following positions: (1) Resident in both countries; (2) resident in Britain only and entitled to income from the Irish Free State; (3) resident in the Irish Free State only and entitled to income from Britain. A company, wherever incorporated, is held as resident where it is managed and controlled.[3] (1) In the case of double residence there

[1] *Brennan's Trs.* v. *Scanlan*, 1925, 41 T.L.R. 452; 9 Tax Cases 427; *Linton* v. *Inland Revenue*, 1928 S.C. 209 (pupils); *Inland Revenue* v. *Wilson*, 1927 S.C. 733; affd. 1928 S.C. (H.L.) 42.

[2] Finance Act, 1926, s. 23; Finance Act, 1928, s. 16.

[3] Agreement in Second Schedule to Finance Act, 1926, clause 4.

are cross-applications of the Dominion tax relief explained below. Those reliefs apply where the same part of the same income is, for the same tax year, liable to taxation in both countries. But in each country the relief is one-half of the taxpayer's appropriate rate of tax (including sur-tax) in that country or in the other country, whichever is the lower. This leaves him to pay the higher of the two rates. A taxpayer who obtains those reliefs may be taxed in Britain on income from the Irish Free State as if his only residence were in Britain, and he may be taxed in the Irish Free State on British income as if his only residence were in the Irish Free State. (2) A person who is resident in Britain and not in the Irish Free State is exempt from tax, including sur-tax, on Irish Free State income. He is taxable in Britain on that income. (3) A person who is resident in the Irish Free State and not in Britain is exempt from British tax, including sur-tax, on British income. He is taxable in the Irish Free State on that income. In most cases arrangements can be made for relief at the source.

SUBSECTION (2).—*Dominion Tax Relief.*

288. The relief here referred to is provided for in s. 27 of the Finance Act, 1920. The object is to prevent double taxation within the Empire. The idea of the scheme is that the Dominions should reciprocate with relief from their side, but that has not yet been done in all quarters. Even where the Dominion in question has reciprocated, the intended relief may in fact fail. The truth is that the whole subject, though not very complicated in conception, is extraordinarily difficult in application, so much so that it is understood that the Department will sometimes in cases of hardship, or what might almost be called miscarriage, give relief by way of concession when it cannot be made out at law. The intricacies involved are such that it must here suffice to give an outline of the relief. The relief in question is a relief from United Kingdom income tax. It is claimable by "persons," which includes companies, and the great bulk of the relief is obtained through companies.

289. The relief is claimable only where, in the same tax year, the same part [1] of the same income has paid tax both in the United Kingdom and in a British Dominion. "Dominion" means any British possession, or protectorate, or mandated country. United Kingdom tax includes super-tax and sur-tax. Dominion tax means income tax or super-tax charged in any Dominion if it appears to the Special Commissioners to correspond with United Kingdom income tax, super-tax, or sur-tax.

290. When the relief applies, *i.e.* relief from United Kingdom tax, that relief is the lower of the two following: (1) The whole of the Dominion rate, or (2) one-half of the United Kingdom rate. But, in applying this formula, "rate" has a special and fluctuating meaning. It does not mean the standard rate of tax, but something nearer to the effective rates, including super-tax or sur-tax. The object is that the

[1] *Rolls Royce, Ltd.* v. *Short*, 1926, 133 L.T. 759; 10 Tax Cases 59.

combined rates shall equal the higher of the two rates, but no more. The United Kingdom relief effects that when the Dominion tax does not exceed one-half of the United Kingdom tax, but otherwise there is a balance of redress still due which the Dominion may or may not supply. Both United Kingdom income tax and super-tax or sur-tax rank for the relief. The relief has relation to the rates of those taxes for which each person is liable; in the case of companies it is the standard rate of income tax, and there is no super-tax or sur-tax. The appropriate rates are obtained thus: (1) Income tax; compare the "taxable income," as explained above,[1] with the tax liability before allowing for life assurance on this Dominion tax relief. (2) Super-tax or sur-tax; compare the "total income" [2] as fixed for super-tax or sur-tax with the super-tax or sur-tax liability. The Dominion tax to be considered is that for a tax year ending with, or within, the British tax year.

291. When a company obtains this relief it must communicate it to all its shareholders in respect of the rate of tax to be deducted from their dividends, including preference shareholders.[3] This holds whether the company has received the relief direct or through another company in which it holds shares.[4] On the other hand, a British company cannot deduct from any dividends paid by it any proportion of foreign or Dominion tax borne by the company.[5]

Subsection (3).—*Shipping Profits.*

292. From the nature of the business, double taxation of profits has caused special difficulty in the business of shipping, which means the business carried on by the owners or charterers of ships. Special provision has accordingly been made on the subject, both where the other taxing authority is a foreign State (1923 Act, s. 18) and where it is a British Dominion or protectorate, or where a mandate is exercised by this country or any part of the Empire (1924 Act, s. 31). The legislation on the subject is in very general terms. The relief depends on reciprocal arrangements to be made between the two authorities, to which legislative authority is then given by Order in Council. Arrangements have been made with the following foreign countries: U.S.A., Norway, Sweden, Denmark, Finland, Holland, Germany, and Iceland. There is no such arrangement with any British Dominion.

Section 26.—Earned Income Relief.[6]

Subsection (1).—*General Earned Income Relief.*

293. Before being brought into the assessment account, earned income is reduced by one-sixth, but the deduction is not to exceed £250.[7] Thus £600 becomes £500; £1500 becomes £1250; £3000 becomes

[1] See para. 122, *supra*.
[2] See paras. 108 *et seq.*, *supra*, and 339 *et seq.*, *infra*.
[3] *Sheldrick* v. *South African Breweries, Ltd.*, [1923] 1 K.B. 173.
[4] *Gold Fields, etc., Co.* v. *Consolidated Gold Fields*, [1926] 1 Ch. 338.
[5] *London and South American Investment Trust* v. *British Tobacco Co.*, 1926, 42 T.L.R. 771.
[6] See paras. 123 *et seq.*, *supra*.
[7] Finance Act, 1925, s. 15.

£2750. The relief is given to individuals. Thus, assume trade profits £4000 (after wear and tear allowance is deducted) and take the following different cases: (1) A sole trader; the relief is £250 only. (2) Two partners, equally interested; the relief is £250 each, or £500 in all. (3) Two partners, one entitled to three-fourths and the other to one-fourth; the relief is £416, being £250 (the maximum) to the senior partner and £166 (one-sixth of £1000) to the junior. (4) Two partners; A entitled to 5 per cent. interest on £4000 capital, that interest not being deducted in arriving at the £4000 profit, and a salary of £400, and B entitled to a salary of £400, the balance going two-thirds to A and one-third to B; this gives A £2600 and B £1400; the earned relief is £483, being £250 to A and £233 to B. An individual may be a partner in two firms and his share of profits from the one may be £2000 and from the other £1000. This does not affect the £250 limit; altogether his earned income relief will be £250 only. The above examples shew that interest on a partner's (or a sole trader's) capital in the business is treated as earned income, but the same does not apply to interest on loans by a partner.

Subsection (2).—*Wife's Earned Income Relief.*

294. If the income of a married couple includes any earned income of the wife, an allowance is given equal to five-sixths[1] of her earned income, but the allowance is not to exceed £45.[2] In other words, only £54 of the wife's earned income counts for this relief. It is regarded as an increase of the marriage allowance, but it is appropriately treated here. It holds irrespective of the amount of the joint income. But the ordinary earned income relief is at the same time obtained on the whole of the wife's income of that nature, subject to the maximum of £250 for both spouses. This may sound somewhat involved, and an illustration will aid:

Husband's earned income			£400
Wife's earned income			100
Joint investment income			100
			£600
Deduct—			
(1) Ordinary earned income relief one-sixth of £500, thus including the whole of the wife's earned £100	£83		
(2) Ordinary marriage allowance	£225		
(3) Wife's earned income relief up to the limit of	45		
		270	
			353
			£247

[1] Finance Act, 1927, Fifth Schedule.

[2] Finance Act, 1920, s. 18 (2).

295. The wife's earned income may be made in the husband's business, but unless she is a legal partner the money must have been paid to her, though it rather appears that it may suffice if it has been passed through the business books in a case where she has actually assisted. There is ample evidence that this relief is very commonly not claimed where the circumstances would justify the claim.

Section 27.—Age Relief.

296. This dates from April 1925.[1] It applies to any taxpayer who, or whose wife living with him, is sixty-five on 6th April, the starting date of the year of assessment. That condition is fulfilled if the birthday is 7th April. The Act does not provide for a husband under sixty-five with a wife over that age, living apart from her but wholly maintaining her. The relief is this: If the total income does not exceed £500, the allowance of one-sixth (ordinary earned relief) is given on the whole income, both earned and investment, or though wholly investment income. Even if the total income is somewhat over £500, there is what is called marginal relief, which means that the tax liability is limited to (1) what it would have been if the income had been exactly £500 plus (2) one-half of the amount by which the income exceeds £500. In the event of death, if the taxpayer has lived for only a part of a tax year, the statutory income of that part is taken as the basis on which to apply the £500 test. Thus, if the income of a full year is £1500, but the taxpayer lives for only the four months 6th April to 6th August, the proportion of income is probably £500, and so the age relief is claimable if he or his wife was sixty-five on 6th April. If the income were £1000 and passed to the wife on the husband's death on 6th October, then both, if sixty-five, would be entitled to the age relief in the same tax year.

Section 28.—Rate Relief.

297. This means that the first £225 of the "taxable income" [2] is charged at one-half of the standard rate of tax.[3]

Section 29.—Personal and Family Allowances.

Subsection (1).—*A Year's Allowances.*

298. It is important to remember that, if a taxpayer lives into a particular tax year at all, he is entitled to a full year's allowances, though his survivance into that tax year may have been for only a very short time. Take the case of an unmarried man, who is entitled to no allowance except the personal £135, who has an investment income of £1620, and who dies on 6th May. Assuming that the income of the one month, 6th April to 6th May, is £135 (one-twelfth of £1620), he is entitled to tax exemption for that year, for his personal allowance is the full £135. In like manner, if a man marries on 5th April 1929 he

[1] Finance Act, 1925, s. 15 (2). [2] See para. 122, *supra*. [3] Finance Act, 1920, s. 23.

is entitled to the £225 marriage allowance for the year 1928–29, and if the marriage is dissolved on 6th April of another (or the same) calendar year, he is again entitled to the £225 allowance for the tax year commencing on that date. While these illustrations are given, it is to be understood that this rule of the "broken period" applies to all the allowances, and that a full year's allowances are given though only a fraction of a year's income is received. It is an advantage to have the allowances, as far as possible, off those sources of income the tax on which is collected in one sum in January, *e.g.* rents, war loan, and bank interest, rather than off other sources, the tax on which is collected half in January and half in July. In order that the allowances may be obtained, the income must be that of the claimant, so that divestiture by bankruptcy is fatal.[1]

SUBSECTION (2).—*Personal and Marriage Allowances.*

299. Every unmarried person, and every widower and widow, is entitled to £135 of income free of tax.[2] Married couples living together are entitled to £225 of income free of tax.[2] The allowance is not lost in cases of compulsory living apart, as, for instance, when one of the spouses is in an asylum, or abroad for health or business reasons. The allowance is obtained even though the spouses are living separate, if the wife is wholly maintained by her husband, unless he is entitled to deduct income tax from the payments which he makes to her. If he maintains her only partially, he is in practice allowed the personal £135 plus the payments which he makes to her, not exceeding £90, or £225 in all, again assuming that he is not entitled to deduct tax from the payments.

SUBSECTION (3).—*Minimum Exemption Limits.*

300. Combining the personal and marriage allowances with the various forms of earned income allowance, the following are the limits of exemption from income tax, even assuming that the taxpayer is entitled to none of the other reliefs explained in this section:—

	Married couples living together.	All others.
1. If income all earned or if age relief applies.	£270	£162
2. If income all investment, and age relief does not apply.	£225	£135
3. If partly earned and partly from investments, and age relief does not apply.	£225 plus one-sixth of the earned income, but less than £270.	£135 plus one-sixth of the earned income, but less than £162.

[1] *Inland Revenue* v. *Fleming*, 1928 S.C. 759. [2] Finance Act, 1920, s. 18.

	Married couples living together.	All others.
4. If wife has an earned income.	Add her earned income, but not exceeding £54, to what would otherwise be the exemption limit, but not exceeding in all £324.	

SUBSECTION (4).—*Children Allowance.*

301. An allowance is made to the taxpayer for "children" [1] in life on 6th April of the year of assessment and then under sixteen years of age, or born during the year of assessment,[2] or without age limit if the child is receiving full-time instruction at any university, college, school, or other educational establishment. There appears to be no warrant for requiring that the instruction shall be in operation at the beginning of the tax year, or that it shall fill the whole year, or for excluding professional or technical instruction.[3] The institution need not be in the United Kingdom. Evening classes will not do, nor private tuition.[4] The age limit disappears also if the child is incapacitated and dependent on the taxpayer, but in that case the allowance is only £25.[5] When the age limit applies it means, in the tax year 1928–29, that the child must have been born after 6th April 1912 and on or before 6th April 1928. If the child's sixteenth birthday is on 6th April 1928, that child is too old if the age limit applies. Death of the child after 12 o'clock midnight on 5th April, before the return or claim is sent in, does not defeat the claim. In the case of a child born during the year of assessment, the claim is competent though the child dies immediately after birth. A child *in utero* does not count.[6] Stepchildren are included though neither parent is living, but not illegitimate children, unless the parents have married after the birth. But, indeed, it would appear that this condition of marriage has in certain cases been removed (see adoption cases below).[7] In the year of the father's death both he and the mother, if surviving, or an adopting elder brother or sister, are entitled to the full claim.

302. Until the tax year 1928–29 the allowance was £36 for the first or only child and £27 for every other child. Now it is £60 for the first or only child and £50 for any other child.

303. It is not necessary that the child (other than an adopted child) be living with the claimant, or even supported in whole or in part by the claimant; nor is it stated that the child must be resident in this

[1] Finance Act, 1920, s. 21.
[2] Finance Act, 1928, s. 16.
[3] *Scottish Woollen Technical College* v. *Inland Revenue*, 1926 S.C. 934; 11 Tax Cases 139.
[4] *Heaslip* v. *Hasemer*, 1927, 44 T.L.R. 112.
[5] See para. 307, *infra*.
[6] *Jackson* v. *Voss*, [1923] 2 K.B. 357; 8 Tax Cases 429.
[7] See para. 304, *infra*.

country. The child may have means of his or her own, but nevertheless the claim may be made by the parent or step-parent, with this exception, that if the child has an income exceeding £60[1] (until 1928–29 £40) there can be no claim. The £60 refers to what is income for income tax purposes. This does not include gifts, but it does include money applied for the child's benefit under trusts. Scholarships and bursaries are excluded in reckoning the £60.

304. The cases of incapacitated children over sixteen and adopted children are exceptional. The former are dealt with under dependent relatives below. As to the latter, the adopting "parent" can claim only if he or she has the custody of the child, if he maintains the child at his own expense, and if there is no one else entitled to claim on account of the child, or if that other person has relinquished the claim.[2] The allowance is obtained in cases which would not ordinarily be described as adoption—for example, orphans living with and maintained by a grandparent, an uncle or aunt, or even an elder brother or sister. Another result appears to be that the parent of an illegitimate child, having the custody of and solely maintaining the child, is entitled to the allowance.

305. It appears not to be necessary that the relationship shall exist on 6th April of the year of assessment even if the child is then living. Thus a step-relationship established by a marriage at any time in the course of the year has been admitted as giving right to the allowance.

Subsection (5).—*Attendant Daughter.*

306. There is an allowance of £25 to any taxpayer who, owing to age or (not " and ") infirmity, "is compelled to depend upon the services of a daughter resident with and maintained by him or her." [3] There is no limit of income in the case of either the taxpayer or the daughter, so the condition of maintenance need not be stressed. It matters not whether the taxpayer is a married man or woman or a widower or widow. In the case of married persons it is enough if either of them requires assistance owing to age or infirmity. There is an official assumption to the effect that no one is old till after seventy, but that is not supported by the statutes, and in practice the allowance is obtained under that age if there is present a certain degree of infirmity. In the case of a widow or widower it is suggested that claims for a housekeeper and an attendant daughter may stand together, though not both in respect of the same daughter; and that view has received effect in practice.

Subsection (6).—*Dependent Relatives.*

307. There is an allowance of £25 for each dependent relative maintained by the taxpayer.[3] In the case of a male claimant the dependant may be a relative of his or of his wife. In the case of a female claimant

[1] Finance Act, 1928, s. 16. [2] Finance Act, 1920, s. 21 (2). [3] *Ibid.*, s. 22.

the dependant may be a relative of hers or of her husband. There is no limit to the degree of relationship; step-relationship is included; also relationship by adoption if established before the adopted was sixteen, and though that relation has not been continuous since. A child is a relative, and thus if a child is incapacitated there is no question of any age limit for an allowance, but the amount falls from £60 or £50 to £25. The general rule is that the relative must be at least partially incapacitated from self-maintenance by old age or infirmity, but that condition does not hold if the relative is the widowed mother of the taxpayer or of his or her wife or husband. The relative's income—that is, income as calculated for income tax purposes—must not exceed £50. It is required that the taxpayer shall be maintaining the relative, but this must be taken along with the other provision that the relative's own income may be £50. If more than one taxpayer contributes to the maintenance, the tax relief is apportioned among them according to their contributions. If the payments are considered to fall short of maintenance, a modified allowance may be passed. It is not stated that the dependant must be resident in the United Kingdom.

SUBSECTION (7).—*Housekeepers.*

(i) *Quantum.*

308. The allowance is now £60;[1] up to 1924 it was £45.

(ii) *Widowers.*

309. Since April 1924[2] the allowance is given to any widower who has a female housekeeper, whether there is any child in the house or not. Up to April 1924 there had to be at least one child for whom the children allowance was being obtained. Practically any woman qualifies as housekeeper, for, though there is a reference to a relative of the widower's own or of his late wife, the rule proceeds that, if no such relative is available, any other female employed by the taxpayer is sufficient. The allowance is not available to a man who is deserted by his wife or who has deserted her, or whose wife is in an asylum or prison, nor after divorce; and it matters not in these cases that there are young children. There is no condition as to the existence or non-existence of salary or wages, or that the taxpayer is maintaining the housekeeper, or as to her income. The allowance cannot be obtained if any other person is entitled to a tax allowance in respect of the same person—for instance, as a child or dependent relative—unless that other claim is given up. Nor can the allowance be obtained if the housekeeper is a married woman living with her husband and the husband has obtained the marriage allowance.

310. It does not appear to be necessary that the housekeeper shall be in residence during the whole tax year or at its commencement. It

[1] Finance Act, 1924, s. 21. [2] *Ibid.*, s. 22.

may be that this allowance and the marriage allowance can both be obtained in the same tax year. It cannot be doubted that this allowance may be obtained in respect of a child of the taxpayer, whether over or under sixteen years of age. There is reason to believe that widowers frequently omit to claim this allowance on the mistaken view that, in order to support it, there must be a paid housekeeper, and the relation of master and servant, and a child to be looked after. On the contrary, it is difficult to conceive of a widower with a house of his own who is not entitled to the allowance.

(iii) *Widows.*

311. Widows are in exactly the same position as widowers in regard to the housekeeper allowance. The housekeeper is to be a female relative of the taxpayer or of her deceased husband; but if no such relative is available, any other female, employed and resident, will do. There is no requirement that the widow shall be old or infirm, or unable to do her own housekeeping, or that a housekeeper is necessary, or that the "housekeeper" does all the housekeeping, or that she shall have another servant under her, or indeed that she herself, if a relative, shall be in the relation of a servant to the widow.

(iv) *Unmarried Persons.*

312. The housekeeper allowance is extended to unmarried persons, male or female, in respect to the case of any brother or sister of his or hers who stands to the taxpayer in the relation of an adopted child.[1] That means that the taxpayer is maintaining the brother or sister, and that the latter is under sixteen years of age or a full-time pupil or student, and does not have an income exceeding £60. The housekeeper must be the taxpayer's mother (a widow or living apart from her husband) or other female relative. A girl, adopted under sixteen, may be the housekeeper when over that age. The housekeeper must reside with the taxpayer and be maintained by him, but there is no rule regarding the limit of the housekeeper's income. The allowance cannot be obtained if either the taxpayer or any other person is entitled to any other family allowance in respect of the housekeeper, unless the right to that other allowance is given up. This means that the taxpayer cannot have this allowance if either he or any other person claims an allowance in respect of the same woman, as a child, adopted child, or dependent relative; but if the taxpayer has the option he will claim the largest.

Subsection (8).—*Procedure on Claims.*

313. This has at last been put on a formal footing in s. 41 of the Finance Act, 1927. If the refund is not adjusted with the inspector of taxes the claim is heard by "the commissioners concerned," and on any point of law their decision may be taken to the Court of Session.

[1] Finance Act, 1920, s. 20; Finance Act, 1924, s. 21.

SUBSECTION (9).—*Effective Exemption.*

314. The formal exemption limits have been already stated.[1] But now that the various personal and family allowances have been dealt with, it is useful to shew how far these, and the life assurance relief and various other tax rules, may in a particular case go in the direction of greatly increasing the effective exemption. Take the case of a man who holds an appointment the remuneration of which consists of a salary of £1300, and a house rent and rate free, with heating, light, and service. He is married. His wife makes £90 by literary efforts. He has six children all under sixteen or full-time students. Each of the children has a tax-free allowance of £48 under their grandfather's will. Three of them have scholarships of £50 a year each. Husband, wife, and each of the children have National Savings Certificates in their names for £500 each. The husband pays £150 a year of life premiums and maintains his mother and his wife's father. In such a case the household account stands thus:

Husband's salary	£1300
Annual value of house	80
Rates, heating, light, and service, value for	150
Wife's earnings	90
Year's accumulating interest on £4000 in National Savings Certificates	200
Children's allowances under grandfather's will	288
Three scholarships	150
Household income	£2258

The only items which count for tax are the £1300 and £90. The £80 and £150 go out on the principle stated above.[2] The £200 from National Savings Certificates is not income for tax purposes. The children are treated separately from their father; and at £48 each they are exempt. The £150 scholarships are not income for tax purposes. The father's claim to the children allowances remains untouched, for, excluding scholarships which do not count, none of the children has more than £60, which, less tax, gives the £48 allowance. Accordingly, the taxation account stands thus:

Husband's salary		£1300
Wife's earnings		90
"Total income"		£1390
Earned income relief	£231	
Marriage allowance	225	
Wife's earned income relief	45	
Six children	310	
Two dependent relatives	50	
		861
"Taxable income"		£529

[1] See para. 300, *supra.* [2] See para. 113, *supra.*

The tax is 2s. on £225, and 4s. on the balance of £304 . .	£83 10
Less 3s. on £150 life premiums	22 10
Tax payable by husband . .	£61 0

But the six children, on repayment claims, obtain refunds of the tax they have suffered on their £48 allowances, £12 each . . £72

So that the household, with an income equal to £2258, suffers no tax at all, and is actually £11 in hand.

Section 30.—Life Assurance Relief.

315. An allowance from income tax is given on this head,[1] the purpose being to encourage thrift and the making of provision for one's old age and for those who come after. The policy must be effected with an insurance company lawfully established in the United Kingdom or in any British possession, or lawfully carrying on business in the United Kingdom, or with a registered friendly society, or, in the case of a deferred annuity, with the National Debt Commissioners. The allowance is in respect of premiums or contributions paid by the taxpayer in the following cases: (1) premiums on policies effected by the taxpayer on his or her own life or by a husband on the life of his wife; (2) premiums paid by a wife out of her separate income on policies on her own life or on the life of her husband; (3) premiums on contracts made by the taxpayer for a deferred annuity (subject as stated below[2]) on his or her own life or by a husband on the life of his wife; (4) premiums paid by a wife out of her separate income for a deferred annuity on her life or on the life of her husband; (5) contributions to widows' funds; and note that this applies not only to ordinary annual payments but also to special payments on entry, marriage, and commutation; (6) contributions to trade unions or friendly societies so far as applicable to superannuation or funeral or other death benefits; (7) sums paid by or deducted from any person in respect that he is, under Act of Parliament or under the terms or conditions of his employment, liable to the payment of any sum, or to the deduction from his salary or stipend of any sum, for the purpose of securing a deferred annuity to his widow or provision for his children after his death; (8) payments under certain superannuation or *bona fide* pension schemes for the benefit of employees or their wives, widows, children, "or other dependants," whether during the taxpayer's life or after his death; it will be noted that in this case the beneficiaries may be persons outside the class of the taxpayer, his wife, and children.[3] The person effecting insurance and claiming the tax allowance may, whether male or female, be unmarried.

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[1] Income Tax Act, 1918, s. 32; Finance Act, 1920, s. 26. [2] See para. 318, *infra*.
[3] Income Tax Act, 1918, s. 32 (3) (*e*); Finance Act, 1920, s. 26 (6); see also Finance Act, 1922, s. 31; para. 307, *supra*.

316. The following classes of policies are available for the allowance: (1) Ordinary whole-life policies; (2) short-term policies, payable only on death and only if it occurs within the short term; (3) contingent policies, payable only on the death of the life assured and only if it occurs before some date or in the lifetime of some other person; (4) endowment policies, payable at a certain age or on death if earlier; (5) double endowment, under which a certain sum is payable at a certain age or one-half sum on death if earlier;[1] (6) school-fee policies in usual terms; (7) accident policies, covering fatal accidents. If covering accidents, both fatal and non-fatal, the proportion of premium applicable to the death risk is all that is allowed; (8) combined life and sickness policies, to the extent of the premium applicable to the death risk; (9) joint assurances on the lives of husband and wife. Joint policies on partners' lives were formerly passed, but not now,[2] though arrangements can still be made to save the relief even in the case of existing policies.

317. The following assurances are not available for the tax relief: (1) Other joint assurances than those just stated;[2] (2) absolute accumulation policies payable at a given date, neither sooner nor later, and irrespective of death; (3) policies on the lives of the taxpayer's children; (4) child's endowment policies payable only at the child's majority, with premiums returnable in the event of earlier death; (5) deferred annuity contracts with premiums returnable on death before the date fixed for the commencement of the annuity. No deferred annuity contracted for after 22nd June 1916 counts in any event, except when effected in connection with certain superannuation or pension schemes; (6) deferred assurance, contracted for after 22nd June 1916, during the period of deferment; (7) contributions to thrift funds; (8) voluntary contributions under the National Health Insurance Act, 1924,[3] or the Widows' Contributory Pensions Act, 1925;[4] (9) any assurance not dependent on death.

318. The relief is not now, as it formerly was, restricted to annual premiums; even single premiums count for the relief, subject to the restrictions following. In all cases the amount of relief obtainable is subject to various restrictions dependent on different bases. (1) There is the income ratio; the premium (exclusive of war extras[5]) must not exceed one-sixth of the income as ascertained for income tax purposes, which may be either less or more than the actual income. If the premiums do exceed that proportion, they count for the relief only up to the amount of one-sixth of the income. All expenses of earning the income and all legal burdens on the income are first taken off, but not any of the income tax allowances. Any loss which may have been allowed off for income tax purposes reduces the income for this assurance

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[1] *Gould* v. *Curtis*, [1913] 3 K.B. 84; 6 Tax Cases 293; *Re National Standard Co.*, [1918] 1 Ch. 427.

[2] *Wilson* v. *Simpson*, [1926] 2 K.B. 500; 10 Tax Cases 753.

[3] 14 & 15 Geo. V. c. 10.

[4] 15 & 16 Geo. V. c. 70.

[5] Income Tax Act, 1918, s. 32 (5).

relief. In a year in which the income, as calculated for tax purposes, is *nil*, or there is a loss, there can be no assurance relief at all. (2) There is also the premium ratio; in ordinary assurances payable on death no more is allowed than 7 per cent. (plus war extras [1]) on the original sum assured, ignoring bonuses. In the case of a policy for £2000 at a certain age or £1000 on earlier death, the 7 per cent. is calculated on the £1000 only. (3) For benefits other than death claims, *e.g.* premiums for annuities, there is a fixed maximum of £100 a year (plus war extras), and always within one-sixth of the income for the total relief. (4) When only part of the premium is paid in cash and the balance is lent by the company, only the cash part counts for the relief.[2]

319. The rate of relief depends on the date of the policy. If dated after 22nd June 1916, the rate is one-half of the standard rate of tax. If dated on or before that date, it depends again on the amount of the income. (*a*) If not exceeding £1000, the rate of relief is one-half of the standard tax; (*b*) if over £1000 but not over £2000, the rate is three-fourths of the standard tax; (*c*) if over £2000, the rate of relief is the full standard tax. The distinction according to date requires to be considered when material changes are in contemplation to be made on a policy originally dated on or before 22nd June 1916.[3] For incomes on the border-line of one of the income steps above stated there is provided a marginal relief [4] by which the assurance relief is increased to what it would have been if the income had been over that step, minus tax at the full standard rate on the amount by which the income is in fact short of that step.

Section 31.—Repayment Claims.

Subsection (1):—*Time Limits for Claims.*

320. With the exception of wear and tear (and even as to that case [5]) all tax reliefs may be given by repayment. But to an increasing degree repayment claims are becoming unnecessary and involve less money. This is partly by the application of the principle of prevention rather than cure, which means that reliefs are given off the assessment, so far as the right to the reliefs is known. This is also greatly facilitated by the vast amount of the 5 per cent. War Loan, the holding of which is so widely spread throughout the community, and the dividends on which are commonly paid without deduction of tax. Then there has been instituted a system of automatic repayment without the necessity of a formal claim in cases where there has been a return of total income. These returns of total income are now, from 1928–29 onwards, to be the rule, and the consequence will be that tax refunds will in future usually be made without an actual claim form. In substance, however,

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[1] Income Tax Act, 1918, s. 32 (5).
[2] *Hunter* v. *The King*, [1904] A.C. 161 ; 5 Tax Cases 13.
[3] *Barton* v. *Miller*, 1922, 8 Tax Cases 315.
[4] Finance Act, 1920, s. 26 (7).
[5] See para. 197, *supra*.

the matter must remain much as it was, for a statement of total income still emanates from the taxpayer, and he will have to check the inspector's tendered repayment so as to assure himself that his rights are being fully met.

321. The ordinary rule is that a claim must be made "within six years after the end of the tax year to which it relates."[1] But when the end of that sixth year is approaching the taxpayer is probably in a position to include it also, so that the one claim may then cover seven years. At the other extreme, claims may be made half-yearly.

322. There is, however, a number of special claims which must be sent in within one year after the end of the year of assessment. Formerly there were even shorter time limits in some cases, but these have now all been extended to one year.[2] In practice two concessions are frequently obtained. If there is difficulty in completing the evidence, or it may be if a professional adviser has been instructed on the eve of the expiry of the time limit, a letter to the inspector stating the intention to make a claim will often be accepted as sufficient compliance, subject to the claim being put into formal shape without undue delay. It occurs to add that in such cases there should not be much difficulty in having a claim form signed and lodged within the time, even though it might subsequently require extensive adjustment. Further, it is understood that when illness or absence from the country can be proved to have caused the delay, a measure of grace is sometimes accorded.

Subsection (2).—*Who May Claim Repayment?*

323. Claims for personal and family allowances are competent to individuals only.[3]

324. The original rule was, and what may perhaps still be called the general rule is, that no claim to any tax allowance is competent to anyone who is not resident in the United Kingdom. This led to very great hardships even in the case of British subjects resident in the Empire but not in the United Kingdom. They might have a very small income from the United Kingdom, and they might be in very modest circumstances altogether, yet they had to pay the full rate of tax on the income from the United Kingdom, and they could obtain no relief whatever, though the position might be that, if they had been resident in the United Kingdom, they would have been exempt. This has now been greatly altered, and the present enactment is in the 1920 Act, s. 24. That section begins by laying down the general rule as stated above, and the modifications come in an important proviso.

325. First, as to the rule. It excludes non-residents from the following reliefs and allowances: (1) Earned income relief; (2) age relief; (3) personal allowance; (4) marriage allowance; (5) wife's earned income

[1] Finance Act, 1923, s. 30. [2] *Ibid.*, s. 30 (3).

[3] *Curtis* v. *Old Monkland Conservative Association*, 1905, 8 F. (H.L.) 9; [1906] A.C. 86; 5 Tax Cases 189.

relief; (6) children; (7) attendant daughter; (8) dependent relatives; (9) housekeeper; (10) rate relief; (11) life assurance.

326. Second, as to the exceptions by the proviso. The nature of the modified relief conceded will be stated below, but meantime as to the persons to whom it is conceded. They are (1) British subjects, not including nationals of British Protectorates or of countries for which Britain holds a mandate; (2) persons who are, or have been, in the service of the State; (3) any widow whose husband was in the service of the State; (4) employees abroad of missionary societies; (5) persons in the service of native States under British Protectorates; (6) persons who, previously resident in the United Kingdom, prove that residence abroad is for health reasons, which may mean the health of the taxpayer or of his wife or child; (7) persons resident in the Isle of Man or Channel Islands. The concession of right to make claims thus applies to all British subjects without qualification or condition. In all the other cases stated it applies though the claimants are not British subjects; nor, except in No. 6, need they ever have been in the United Kingdom.

327. The concession works thus: The total income of the claimant and his wife, wherever arising, and whether subject to United Kingdom tax or not, is ascertained, and in doing so all the rules of United Kingdom tax law are regarded. Then it is calculated what the United Kingdom tax, including sur-tax, would amount to if the whole income were subject to United Kingdom taxation. Assume that would be £100; the relief is that the United Kingdom tax will be reduced to, but not below, an amount which bears the same proportion to £100 as the United Kingdom income bears to the total income. This may result in exemption, but it can never bring into taxation any income which would not otherwise be taxable.

328. It is not to be thought that non-residents are, or ever were, excluded from the right to state, and receive the benefit of, all deductions which are actual reductions of income—*e.g.* (1) wear and tear, (2) rents lost or abated, (3) excess maintenance of property, (4) bank interest. These all reduce income, and these reliefs are all obtainable by any non-resident. At worst, he is made to pay on true income, not on more. He is also entitled to the Dominion tax relief if his income is taxed both in the United Kingdom and in the Dominions.

Section 32.—Time Limits for Claims to Allowances.

329. (1) Personal and family allowances, including life assurance; six years from the end of the year of assessment to which the claim relates.[1] (2) Charities, friendly societies etc.; the same.[1] (3) Under Schedule A, No. V.; the like.[1] (4) Bank interest, etc.; the same.[1] (5) Accumulations of income depending on a contingency; six years

[1] Finance Act, 1923, s. 30 (1).

from the end of the year of assessment in which the contingency happens.[1] (6) Separate assessment of husband and wife; 6th July in the year of assessment, but as regards the year of assessment in which the marriage occurs, before 6th July of the following year [of assessment].[2] (7) Assessment under Schedule D for farm or woodlands; before 5th June (Scotland, 5th August) of the year of assessment.[3] (8) Short profits under Schedule B; one year after the end of the year of assessment.[4] (9) Separation of woodlands on one estate; ten years after planting or replanting.[5] (10) Error in assessments under Schedule D owing to mistake in return. In these three cases if the assessment was "made" on or before 5th April 1923, within three years,[6] and if made after that date, within six years[7] after the end of the year of assessment within (not for) which the assessment was made.[6] (11) In succession cases, to have business treated as discontinued and a new business commenced; within three months after the change.[8] (12) For setting off loss in one trade against profit in another; before the assessment is made.[9] (13) Wear and tear; in the ordinary case before any assessment is made, but *quaere*; on leased plant, within one year after the end of the year of assessment.[10] (14) Dominion tax relief, including relief in respect of Irish Free State tax; within six years from the end of the year of assessment. (15) In cases of all kinds not above specified it may be taken that the time limit is one year from the end of the year of assessment.[11]

Section 33.—Appeals.

330. Claims for exemption go to the General Commissioners.[12] So do appeals under Schedule A and Schedule B.[13] If any dispute arises as to annual value the Commissioners may, and if required by the appellant shall, obtain a valuation from an expert, "and the annual value shall be determined in accordance with that valuation."[14] But appeals under Schedule A, No. III., Rules 1 and 2 (quarries and mines now transferred to Schedule D, Case I.),[15] may be taken to the Special Commissioners.[12] Appeals under Schedule D and Schedule E[16] may go to either the Special Commissioners or the General Commissioners as the appellant may elect, and that whether the assessment under Schedule D has been made by the Special or by the General Commissioners.

331. The notice of appeal must be given within twenty-one days of the date of the assessment,[17] not of its receipt by the taxpayer. In Schedule D cases the grounds of appeal must be stated,[18] and on the

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[1] Finance Act, 1923, s. 30 (2).
[2] Finance Act, 1919, s. 26.
[3] Sched. B, rules 5, 7.
[4] *Ibid.*, rule 6.
[5] *Ibid.*, rule 7.
[6] Finance Act, 1923, s. 24.
[7] Finance Act, 1926, s. 27.
[8] *Ibid.*, s. 32.
[9] Sched. D, Cases I. and II. rule 13.
[10] *Ibid.*, rule 6 (5).
[11] Finance Act, 1923, s. 30 (3).
[12] Income Tax Act, 1918, s. 148.
[13] *Ibid.*, s. 136; Finance Act, 1923, s. 26.
[14] Income Tax Act, 1918, s. 138.
[15] Finance Act, 1926, Third Schedule.
[16] Finance Act, 1922, s. 19.
[17] Income Tax Act, 1918, s. 136.
[18] Finance Act, 1926, s. 25.

hearing the evidence and argument may [1] be confined to the grounds thus stated. An assessment may be increased on "appeal." [2]

332. Appeals are allowed to the Special Commissioners [3] on questions of (1) ordinary residence in the case of securities which are tax-free when held by persons not ordinarily resident in the United Kingdom; [4] (2) domicile or ordinary residence under Cases IV. and V. of Schedule D; (3) residence in the case of foreign and Dominion securities under Schedule C; [5] (4) residence in the case of repayment claims in such cases. Further, appeals lie to the Court of Session and the House of Lords, but only on questions of law; [6] and this applies only to appeals, and not to grants or refusals of claims for relief.[7]

PART II.—SUPER-TAX AND SUR-TAX.

Section 1.—Introductory.

333. This is an additional income tax [8] on the larger incomes. At present there is no liability except on the excess income over £2000. The rate of the tax varies from 9d. to 6s. per £. Ninepence is the rate on the first £500 over £2000, and 6s. is the rate on any excess of income over £30,000. These figures indicate, and it is the fact, that the graduation of super-tax or sur-tax is of a totally different kind from the graduation of ordinary income tax which prevailed up to 1920. In super-tax or sur-tax the excess income over £2000 is divided into successive blocks, each block bearing its own rate of tax in an ascending scale till the maximum of 6s. per £ is reached. The blocks are of varying amounts. Thus, take an income of £4000. The first £2000 is exempt, and that is so no matter how large the total income may be. The next £500—between £2000 and £2500—is the first super-tax block; it pays 9d. per £. The second block is also £500—between £2500 and £3000; it pays 1s. per £. The third is £1000—between £3000 and £4000; it pays 1s. 6d. per £. Those three blocks, and all higher blocks, are each self-contained, paying its own rate of tax, and having nothing to do with the rate chargeable on the block below or the block above.

334. The tax year 1928–29 is the last year of super-tax.[9] It is also the first year of sur-tax.[9] Both taxes are charged for the year 1928–29, but chargeable on different incomes and payable on different dates, with a year between. Sur-tax is intended to be super-tax writ short, and mainly to follow the same rules, but there are the following important differences: (1) The ordinary income tax and the super-tax

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[1] Finance Act, 1926, proviso.
[2] Income Tax Act, 1918, s. 137 (5).
[3] Finance Act, 1924, s. 27.
[4] Income Tax Act, 1918, s. 46.
[5] General rule 2 (*d*) of that schedule.
[6] Income Tax Act, s. 149.
[7] *Furtado* v. *City of London Brewery*, [1914] 1 K.B. 709.
[8] *Bowles* v. *Attorney-General*, [1912] 1 Ch. 123; 5 Tax Cases 685.
[9] Finance Act, 1927, s. 38 (1).

for the same assessment year are charged on different incomes of different years; the ordinary income tax and the sur-tax for the same assessment year are charged on the income of the same year. (2) Super-tax is payable on 2nd January of the year of assessment; sur-tax is payable on 2nd January after the expiry of the year of assessment. (3) The change from super-tax to sur-tax has been so made as to lead to a material increase of liability on death.

335. To explain and illustrate the first and second of the above-mentioned points of difference: Super-tax is chargeable on the statutory income of the preceding year. Thus, in the tax year 1928–29 ordinary income tax is charged on (1) the actual income of 1927–28 so far as taxed by direct assessment, and (2) the actual income of 1928–29 so far as received under deduction of tax at the source. But super-tax for the same year 1928–29 is charged on (1) the income which was charged by direct assessment in the preceding year 1927–28, being in the ordinary case the actual income of that nature for the year 1926–27, and (2) the actual income of 1927–28 so far as received under deduction of tax at the source. In contrast to this, sur-tax for 1928–29 is charged on the same income as is charged to ordinary income tax for that year, being (1) the actual income of the preceding year 1927–28 so far as charged by direct assessment, and (2) the actual income of 1928–29 so far as received under deduction of tax at the source. This identity of the income for ordinary income tax or "standard rate" and for sur-tax is made plain in s. 38 of the Finance Act, 1927: "Income tax for the year 1928–29 and every subsequent year shall, instead of being charged at a single rate, be charged at a standard rate and, in the case of an individual whose total income from all sources exceeds a stated amount [at present £2000], at a rate or rates exceeding the standard rate in respect of any part or parts of his income in excess of that amount."

336. The section proceeds to enact that the payment or payments of the standard rate shall "be deemed to be an instalment" of the year's tax, and the excess tax ("sur-tax") shall be charged "as a deferred instalment" of the year's tax. Where we have been accustomed to have the ordinary income tax paid in one sum, say, on 2nd January 1929 for the tax year 1928–29, the standard rate will be payable on that date, and the deferred instalment—the sur-tax—a year later, on 2nd January 1930. Where, on the other hand, we have been accustomed to have the ordinary income tax paid half on, say, 2nd January, and half on 1st July 1930 for the tax year 1929–30, the standard rate will be payable one-half on each of those dates in the year 1930, and the deferred instalment—the sur-tax —on 2nd January 1931. In other words, the sur-tax for each year of assessment is payable on 2nd January after the expiry of the year of assessment.

337. As to the third point of difference: The super-tax rule in case of death is that the deceased's estate is liable for only a proportion of what would have been his whole super-tax for the year of death, that

proportion corresponding to the period of the tax year during which he survived.[1] Thus, suppose that he dies on 6th May 1928, and that his super-taxable income for 1928–29 (the 1927–28 income) is £4000, his estate is liable for one-twelfth of what would have been his whole 1928–29 super-tax if he had survived to 5th April 1929. It matters not that one-twelfth of his super-tax income is far below the super-tax minimum of £2000. But under the super-tax rules that would be the end of super-tax liability; his estate would have had no liability for any super-tax payment in the tax year after his death. This is changed in regard to sur-tax. Assume the death on 6th May 1929, and that the deceased paid his 1928–29 super-tax on 2nd January 1929. The deceased's estate is still liable for (1) a full year's sur-tax, 1928–29, payable on 2nd January 1930; and (2) sur-tax, 1929–30, payable on 2nd January 1931, but only if the deceased's sur-taxable income for the one month, 6th April to 6th May 1929, exceeded £2000, and only on the excess over £2000.

Section 2.—Administration.

338. Sur-tax (which term will now be used to the end) is assessed by the Special Commissioners.[2] Parties who are liable to assessment have the duty placed on them of giving notice of that fact before 30th September after the year for which the tax is chargeable;[3] and on failure to do so, are liable to penalty, but this penalty evidently does not apply to non-residents.[4] Assessments and additional assessments may be made within a time limit of six years after the year of assessment. There is an appeal to the Special Commissioners,[5] and on law to the Court of Session, and finally to the House of Lords. By s. 36 (2) of the Finance Act, 1927, these appeals are allowed in the cases of sales and purchases *cum* dividend, and where more than a year's income is received within one tax year.

Section 3.—The Sur-taxable Income.

339. If the income is British and amounts to the required total, it matters not that the person entitled to it is not resident in this country.[6] Whether the income is British or not, if the person entitled to it was resident in the tax year, it matters not that he has lost his British residence before the commencement of the tax year in which the sur-tax is payable.

340. In making up the account of total income, everything that is income for the standard rate is income also for sur-tax. The converse

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[1] Income Tax Act, 1918, s. 6. In case of separate assessment of husband and wife, *Wyndham* v. *Inland Revenue*, [1920] 3 K.B. 260; 7 Tax Cases 608.

[2] Finance Act, 1927, s. 42 (2).

[3] *Ibid.*, s. 44 (1).

[4] *Whitney* v. *Inland Revenue*, [1926] A.C. 37; 10 Tax Cases 88.

[5] Finance Act, 1927, s. 42 (7).

[6] *Brooke* v. *Inland Revenue*, [1918] 1 K.B. 257; 7 Tax Cases 261.

also holds.[1] Apart from the provisions of s. 33 of the 1927 Act,[2] when a stock is sold *cum* dividend the whole price is capital, and it is not competent to assess the seller for sur-tax on a proportion supposed to represent the accrued dividend.[3] On the purchaser's side the whole dividend is sur-taxable, and it does not avail to alter this that in the contract a specified part of the price has been allotted to the accrued dividend.[4]

341. All charges on income are to be deducted, even though these are paid under deduction of tax, because that means deduction of the standard rate only and not of sur-tax also. Deduction is also taken of all payments made under contractual obligations,[5] these having been made out of taxed income. This is the granter's side of the tax gain from those arrangements. Interest paid to banks, stockbrokers, and discount houses in respect of which a refund of the standard rate has been obtained,[6] will also be deducted; also interest paid on death duties in the proportion (while the standard rate is 4s.) of a deduction of £5 for each £4 of such interest paid. The following have also been allowed: Payments under a binding contract by a liferenter to appropriate, out of income, sums to reserve to protect the fiar;[7] and sums, even weekly sums, paid by a husband to his wife after separation.[8] In regard to interest, the general rule is that only "annual interest" is deductible; as to what falls under that description, see the case cited.[9] Life assurance premiums are not a deduction, though the taxpayer has mortgaged the policy and has come under obligation to keep up the policy.[10] The statutory rule is that, as regards all deductions on account of sums paid under deduction of income tax, the deduction allowed shall be the sums payable in the year of assessment though they may have accrued, or may accrue, wholly or partly before or after that year;[11] but under a similar previous provision regarding super-tax[12] it was held, in regard to an entail annuity where Court procedure had delayed payment, that when the Court had decided the starting date, one year's annuity, and that only, could be deducted in each year's computation.[13]

Section 4.—No Allowances.

342. In reaching the sur-taxable figure none of the following allowances is deducted: (1) Earned income reliefs—the earned income comes into the account at its full figure; (2) personal or marriage allowance;

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[1] See para. 108 *et seq.*, *supra*. [2] See para. 343, *infra*.

[3] *Wigmore* v. *Summerson & Sons*, [1926] 1 K.B. 131; 9 Tax Cases 577; *Inland Revenue* v. *Oakley*, [1926] 1 K.B. 137; 9 Tax Cases 582.

[4] *Inland Revenue* v. *Forrest*, 1924 S.C. 450; 8 Tax Cases 704; but see para. 344, *infra*.

[5] See para. 283, *supra*. [6] See para. 275, *supra*.

[7] *Stocker* v. *Inland Revenue*, [1919] 35 T.L.R. 607; 7 Tax Cases 304.

[8] *Eadie* v. *Inland Revenue*, [1924] 2 K.B. 198; 9 Tax Cases 1.

[9] *Inland Revenue* v. *Hay*, 1924 S.C. 521; 8 Tax Cases 636.

[10] *Earl Howe* v. *Inland Revenue*, [1919] 2 K.B. 336; 7 Tax Cases 289.

[11] Finance Act, 1927, s. 39 (2). [12] Income Tax Act, 1918, s. 5 (3).

[13] *Inland Revenue* v. *Earl of Haddington*, 1924 S.C. 456; 8 Tax Cases 711.

(3) family allowances—housekeeper, children, attendant daughter, and dependent relatives; (4) life assurance premiums. It will be observed that these are all pure income tax allowances which do not in fact reduce the income. But to ascertain the sur-taxable figure there are deducted all items which do reduce the income, *e.g.* wear and tear, lost rents, excess maintenance. Dominion tax relief is not taken into account in computing sur-tax; it is given from the standard rate.[1]

Section 5.—Sales and Purchases *cum* Dividend.

343. It was understood that a practice had grown up of transferring stock when "full" of dividend, *cum* dividend, with the result of avoiding super-tax. That result was reached because the full consideration received by the seller was capital to him; no part of it could be treated as apportionable as income and be made liable to taxation accordingly. In most cases the stamp duty and brokers' charges interposed considerable difficulty; but there were fields in which the operation could be, and was, practised. This led to the enactment of s. 33 of the Finance Act, 1927, which is designed to block those tactics within certain limits. The section applies to all stocks or securities entitled to interest or dividend at a fixed rate only, and not dependent on profits; but in the case of other stocks, securities, and shares it applies only if the sale has been effected otherwise than on the Stock Exchange and by a transfer stamped 1 per cent. The Special Commissioners may demand particulars of sales, purchases, dealings, contracts, arrangements, transfers, or other transactions. If it then appears that for any year the taxpayer has so managed such matters as to reduce his super-tax or sur-tax liability by more than 10 per cent. of what would have been his liability if the assets in question had yielded income accruing from day to day, his liability shall be raised to that basis. But he escapes if he proves that the avoidance of sur-tax was exceptional "and" did not exist at all in the three next preceding tax years.

344. The converse case of purchases *cum* dividend is dealt with in s. 35 of the same Act; the taxpayer may obtain relief if he shews that in consequence of the sale or transfer to him of any assets his super-tax or sur-tax liability has been increased by more than 10 per cent. beyond what it would have been if the income from those assets had accrued from day to day. But he must bring into computation also questions of income on assets sold or transferred by him, and he must claim within the time limit for appeal against that year's tax. In s. 35 there is no restrictive definition of "assets" as in s. 33.

Section 6.—More than a Year's Income.

345. It may happen that in any particular year more than one year's income from a particular asset is received. One case is where a company

[1] Finance Act, 1927, s. 42 (6).

paying one annual dividend in May happens in one tax year to pay one year's dividend on 1st May and the next year's dividend on 1st April following, or several years' arrears of a cumulative preference dividend may be paid up on one date. In such a case both or all the dividends had to be included in the super-taxable income of that year. This is remedied by s. 34 of the Finance Act, 1927, but only if the result would otherwise be to increase the sur-tax by more than 5 per cent. The remedy is by assuming an accrual from day to day, and the assessments of previous years may be increased.

Section 7.—Husband and Wife.

346. Rule 16 of All Schedules Rules operates to make the wife's income that of the husband for sur-tax. But that is only for the period of the marriage and while the spouses are living together. The actual income of the wife up to the date of marriage, and during separation, and after the dissolution of the marriage, is her own even for tax purposes. There is no aggregation of her income for those periods; she is assessable in respect of it,[1] and those assessments may be made during the marriage.

347. By timeous notice, given by either husband or wife, separate assessments are secured, but the total tax is not to be less than if there had been one assessment only and on the husband, and the amount is divided between them in proportion to their respective incomes.[2] The notice has to be given "before" 6th July in the year next following the year of assessment; that is to say, 6th July before the 2nd January on which the tax is payable. The apportionment of sur-tax is to be according to the spouses' respective total incomes, not their incomes over £2000, and it is not stated that the application can be made only when both spouses have incomes over £2000. *Quære* whether the application could be made by a spouse whose income did not exceed £2000. As to the result when assessments have been thus separated and one of the spouses dies, see the case cited.[3]

Section 8.—Individuals, Partnerships, and Companies.

348. It was the original rule for super-tax that it was chargeable only on individuals. That, however, left each partner in a firm liable to bring into his account for super-tax his share of the partnership profits ascertained as stated above.[4] But in the case of an incorporated company all that had to be brought into account by each shareholder

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[1] *Inland Revenue* v. *Brooke*, [1923] 2 K.B. 814; 8 Tax Cases 527; *Lockhart Leith* v. *Inland Revenue*, [1923] 2 K.B. 814; 8 Tax Cases 527; *Bell* v. *Inland Revenue*, 1923, 39 T.L.R. 533; *Murray* v. *Inland Revenue*, [1923] 2 K.B. 814; 8 Tax Cases 527; *Portman* v. *Inland Revenue*, [1923] 2 K.B. 814; 8 Tax Cases 527.

[2] Finance Act, 1927, s. 42 (9).

[3] *Wyndham* v. *Inland Revenue*, [1920] 3 K.B. 260; 7 Tax Cases 608.

[4] See para. 204, *supra*.

was the gross amount of the dividend received by him. In the case of one-man and other controlled companies, this led to many special forms of finance, as, for example, when a very small dividend or none was paid though large profits were made, and the controlling shareholder obtained "loans" from the company corresponding in amount to what a reasonable dividend might have been; the position might then be that the loans escaped super-tax.[1] But even in large public concerns profits might be accumulated in reserve, and subsequently capitalised and distributed as additional stock, or shares, or debentures at very short dates. These methods might be successful in avoiding super-tax on the amounts so treated, even though there was an effective option to the shareholder to take cash,[2] or they might be unsuccessful.[3]

Section 9.—Special Legislation for Certain Companies.

Subsection (1).—*Companies carrying on Business.*

349. This legislation is contained in s. 21 and the First Schedule of the Finance Act, 1922, and ss. 31 and 32 of the Finance Act, 1927. The object is to counteract arrangements under which certain companies do not distribute a reasonable amount of their actual total income in such a form as to subject it to sur-tax in the hands of the shareholders. The administration is vested in the Special Commissioners, subject to appeal to the same Commissioners, then an appeal to the Board of Referees, and finally, on law to the Court of Session and the House of Lords; but the appeal on law may go straight from the Special Commissioners to the Courts.[4] If it is held that the distribution falls below a reasonable part of the income, the result is that the whole income is deemed to have been distributed, not merely so much more as will make the distribution reasonable.[5] It is not necessary for the Department to shew that the low distribution has been due to a desire to avoid sur-tax.[4]

350. These special rules now [6] apply to any company incorporated under the Companies Acts, irrespective of the date of incorporation, but only if the company is under the control of not more than five persons, is not a subsidiary company, and is not a company in which the public is substantially interested. All those terms are very fully defined in the Acts.

351. When the Special Commissioners take action the company may reply by a statutory declaration that there has not been, and will not be, any avoidance of sur-tax by reason of non-distribution of a

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[1] *Inland Revenue* v. *Fisher's Exrs.*, [1926] A.C. 395; 10 Tax Cases 302; *Whitmore* v. *Inland Revenue*, 1926, 10 Tax Cases 645.

[2] *Inland Revenue* v. *Wright*, [1927] 1 K.B. 333; 11 Tax Cases 181.

[3] *Inland Revenue* v. *Coke*, [1926] 2 K.B. 246; 11 Tax Cases 181.

[4] *Carlaw & Sons* v. *Inland Revenue*, 1926 S.C. 870; 11 Tax Cases 96.

[5] At least so assumed in *Carlaw*, *supra*.

[6] Finance Act, 1927, s. 31 (3).

reasonable amount, and setting out the facts and circumstances.[1] The Special Commissioners may accept this and drop the matter.[1] Or the issue may be referred to the Board of Referees to decide whether there is a *prima facie* case against the company; if they decide "no," the matter drops; if "yes," the investigation proceeds.

352. The method of procedure is by an apportionment of the year's income by the Special Commissioners among the members according to their "respective interests." [2] The apportionment is appealable.[3] The effect of the apportionment is to add to each member's sur-taxable income his share of the apportionment, under deduction of any share already distributed to him by the company. If the income still does not exceed £2000, that member has no sur-tax liability. Notice is sent to the member liable; he may pay, or he may leave it to the company to do so. If the member does not pay, the company is charged.[4] There is provision against a second liability on the occasion of the actual distribution of the profit thus taxed in advance as notionally distributed.[5]

Subsection (2).—*Liquidations.*

353. The ordinary rule is that profits in hand at the date of liquidation, and distributed by the liquidator, do not contribute to the sur-taxable account of any member,[6] though it may be otherwise when the liquidator pays pre-liquidation arrears of preference dividend.[7] But that general rule is abrogated in liquidations of companies of the class referred to above [8] if the Special Commissioners are of opinion that there has been an unreasonably small distribution in the broken period of the tax year up to the date of liquidation, or in the tax year immediately preceding.[9]

Subsection (3).—*Interconnected Companies.*

354. When company A has had a distribution direction made against it in the manner above stated, it may happen that companies B, C, and D are (*a*) members of company A, and (*b*) companies of the class referred to above.[1] In like manner it may happen that each of companies B, C, and D have companies of the same class among their members; and so on *ad infinitum*. Provision is made [10] for following out to the end the placing of the income of company A affected by the distribution direction, so that the ultimate sur-tax liability shall be enforced. This is without the necessity of new distribution directions against those other companies, though it might also happen that they also had independent distribution directions made against them.

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[1] Finance Act, 1927, s. 31 (7). [2] Finance Act, 1922, First Schedule, 8.
[3] *Ibid.*, 10. [4] *Ibid.*, s. 21 (3). [5] *Ibid.*, s. 4.
[6] *Inland Revenue* v. *Burrell*, [1923] 2 K.B. 478; 9 Tax Cases 27.
[7] *Inland Revenue* v. *Wright*, [1926] 2 K.B. 246. [8] See para. 350, *supra*.
[9] Finance Act, 1927, s. 31 (4). [10] *Ibid.*, s. 32.

Section 10.—Free of Sur-Tax.

355. Reference is made to "free of tax" cases.[1] It should also be explained that though sur-tax is now an integral part of the year's income tax, the rule still holds that for all purposes of deduction of tax at the source it is only the standard rate, and not the sur-tax rate, that is deducted.[2] Even as to super-tax the strong current of decision was in the direction of holding that a bequest "free of income tax" was also free of super-tax.[3] On the other hand, in cases of annuities "free of all deductions including income tax,"[4] or "of such a sum as after deducting income tax will leave" a certain sum,[5] the annuitants have been held to be left to pay their own super-tax; this on the view that the language used limited the relief to ordinary tax because it only is deducted at the source on payment. Even in such cases as those the new sur-tax scheme may lead to a change of view. Two further aspects require to be noted. First, in making or construing a bequest free of sur-tax it has to be remembered that there is no sur-tax on incomes not exceeding £2000, and that over that amount it is a fluctuating rate. The bequest in question may be the cause of first attracting sur-tax or it may raise the rate. It follows that no ordinary clause will entitle the grantee to complete indemnity against sur-tax; there must be an apportionment.[6] A clause excluding apportionment, but setting up a limit of relief, was construed in the case cited.[7] Second, all relief clauses augment the sur-taxable income; the relief becomes taxable.[8]

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[1] See para. 262 *et seq.*, *supra*.
[2] Finance Act, 1927, s. 39 (1).
[3] *Wordie's Trs.* v. *Wordie*, 1922 S.C. 28; *Smith's Trs.* v. *Smith*, 1924 S.C. 485.
[4] *Crawshay*, [1915] W.N. 412; see *Paddock* v. *Bowen*, [1925] W.N. 206.
[5] *Bates*, [1925] 1 Ch. 157.
[6] *In re Bowring*, 1918, 34 T.L.R. 575; *Doxat* v. *Doxat*, [1920] W.N. 262.
[7] *Craig* v. *Lady Armaghdale*, [1928] W.N. 26.
[8] *Meeking* v. *Inland Revenue*, [1920], 7 Tax Cases 603.

INCOMPETENCY.

See PRACTICE AND PROCEDURE.

INCORPORATION.

See CORPORATION.

INCUMBRANCES.

See BURDENS; HERITABLE SECURITIES; SEARCHES.

INDECENT ADVERTISEMENTS.
INDECENT PRACTICES.
INDECENT WORKS.

See CRIME.

INDEFINITE PAYMENTS.

See PAYMENT.

INDENTURE (APPRENTICESHIP).

See MASTER AND SERVANT.

INDICTMENT.

See CRIME (PROCEDURE).

INDIRECT EVIDENCE.

See EVIDENCE.

INDORSING WARRANT.

See CRIME (PROCEDURE).

INDUCIÆ.

See CITATION; CRIME (PROCEDURE); DILIGENCE; SEQUESTRATION.

INDUSTRIAL ASSURANCE.

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Section 1.—Introductory.

356. The phrase "industrial assurance" refers to a particular and specific branch of assurance business which may be carried on by certain friendly societies and assurance companies alone. This particular branch must be kept distinct and separate from all other classes of business carried on by such societies and companies, with regard to which and to the general law affecting these friendly societies and insurance companies reference should be made to the articles on Friendly Societies and Insurance (Life).

357. The law relating to industrial assurance is wholly statutory. The principal Act dealing with this subject is the Industrial Assurance Act, 1923,[1] but as this is an amending, as well as a consolidating statute, reference must be made also to the Friendly Societies Acts of 1896,[2] 1908,[3] and 1924,[4] and to the Assurance Companies Act, 1909.[5]

Section 2.—Supervision and Control of Industrial Assurance Companies and Collecting Societies.

358. Under the Industrial Assurance Act, 1923, the supervision and control of these companies and societies in the United Kingdom is

[1] 13 & 14 Geo. V. c. 8. [2] 59 & 60 Vict. c. 25. [3] 8 Edw. VII. c. 32.
[4] 14 & 15 Geo. V. c. 11. [5] 9 Edw. VII. c. 49.

vested in the Chief Registrar of Friendly Societies, under the name or style of the Industrial Assurance Commissioner,[1] to whom the powers relating to industrial assurance business formerly exercised by the Board of Trade under the Assurance Companies Act, 1909, have been transferred.[2] The Commissioner has power to appoint any person to act as his deputy,[3] and in Scotland the Assistant Registrar for Scotland acts as such.

359. The Commissioner's authority is wide, and includes the following powers: (*a*) The exemption in specified cases of a collecting society from any provision of the Industrial Assurance Act, 1923;[4] (*b*) the supervision and inspection of the affairs,[5] accounts, balance-sheets,[6] and valuations[7] of any industrial assurance company or collecting society, with power, in certain contingencies, to ordain the dissolution of any such society or the presentation of a petition to the Court for the winding-up of any such company;[8] (*c*) the modification and amendment, in certain circumstances, of the terms (relating to lapse and surrender) of war bond policies issued by any society or company;[9] (*d*) the hearing and determination of any dispute referred to him arising between a collecting society or industrial assurance company and any member or person insured, or any person claiming through such member or person, or any person aggrieved who has ceased to be a member, or any person claiming through such person;[10] (*e*) the sanction or veto of proposed amalgamations and transfers of engagements of collecting societies;[11] (*f*) the composition and promulgation, subject to the approval of the Treasury and the sanction of Parliament, of regulations for prescribing anything which, under the Industrial Assurance Act, 1923, is to be prescribed, for imposing fees, and generally for carrying that Act into effect.[12]

Section 3.—Industrial Assurance Business.

360. Under the Collecting Societies and Industrial Assurance Companies Act, 1896, the law relating to industrial assurance business was applied by reference to a statutory definition of the societies and companies transacting such business. The Industrial Assurance Act, 1923, which repealed the Act of 1896,[13] altered the basis of the application of the law and substituted for it a statutory definition of the term "industrial assurance business," and a specification of the societies and companies alone entitled to carry on such business.

361. The term "industrial assurance business" is defined as the business of effecting assurances on human life, premiums in respect of

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[1] 1923 Act, s. 2 (1). [2] *Ibid.*, ss. 7 (1), 12 (2). [3] *Ibid.*, s. 2 (2).
[4] *Ibid.*, ss. 10 and 11. [5] *Ibid.*, s. 17; 59 & 60 Vict. c. 25, s. 76.
[6] 1923 Act, s. 16; 1909 Act, s. 7. [7] 1923 Act, s. 18.
[8] *Ibid.*, s. 17 (2), and s. 18 (1) (*f*) and (3). [9] *Ibid.*, s. 30.
[10] *Ibid.*, s. 32; 59 & 60 Vict. c. 25, s. 68.
[11] 1923 Act, s. 36; 59 & 60 Vict. c. 25, s. 70.
[12] 1923 Act, s. 43. [13] *Ibid.*, s. 46 (4), and Fifth Schedule.

which are received by means of collectors. There are expressly excluded from this definition (*a*) assurances, the premiums on which are payable at intervals of two months or more, (*b*) assurances effected by a society or company established prior to the date of the passing of the Act, which had then no assurances outstanding, the premiums on which were payable at intervals of less than one month, so long as the society or company continues not to effect any such assurance, (*c*) assurances effected prior to the passing of the Act, the premiums on which are payable at intervals of one month or upwards, and which have prior to that date been treated as part of the business transacted by a branch other than the industrial branch of the society or company, and (*d*) assurances for £25 or upwards effected after the passing of the Act, premiums on which are payable at intervals of one month or upwards, and which are treated as part of the business transacted by a branch other than the industrial branch of the society or company, in cases where the Commissioner certifies that the terms and conditions of such assurances are on the whole not less favourable to the assured than those imposed by the Act.[1]

362. Exemption from all or any of the provisions of the Act may be granted to a society on application to the Commissioner, who is empowered to grant a certificate where he is satisfied that the society does not or will not carry on industrial assurance business at a greater distance than ten miles from its registered office, and provided that he is satisfied that the society is not one to which those provisions ought to apply. The Commissioner may revoke the certificate at any time.[2]

363. The industrial assurance business which collecting societies and industrial assurance companies may carry on includes the issuing of policies insuring money to be paid for the funeral expenses of a parent, child, grandparent, grandchild, brother, or sister.[3] This form of assurance is strictly limited under the Act of 1923. In the case of a collecting society, such a policy is granted only to a member of the society for the payment of funeral expenses alone, and that only on the death of certain relatives of the member. A policy granted for the purpose of insuring money to be paid on the death of any other person, even a relative of the member, will be held to be illegal and not within the powers of the society, which, along with its officers responsible for the granting of the policy, will be liable in respect of an offence under the Act.[4] Moreover, these policies cannot be issued by a collecting society unless the granting of this form of assurance is included in its rules.[5] The policy lapses on the death of the member of the society by whom it was taken out, unless its continuance is provided for under the rules of the society. A claim made against a company or society under such a policy, when paid in full, debars the policy-holder from further claims in respect of the same death against other companies or societies with which he has

[1] 1923 Act, s. 1 (2).
[2] *Ibid.*, s. 10.
[3] *Ibid.*, s. 3; 59 & 60 Vict. c. 25, s. 8 (1) (*b*).
[4] 1923 Act, s. 5.
[5] *Ibid.*, s. 8 (2) (*b*).

taken out similar policies.[1] Only claims for funeral expenses which are reasonable in view of the facts of each case can be claimed and allowed.[2] Assurances on children's lives are also included in industrial assurance business.[3]

364. Collecting societies and industrial assurance companies issuing policies of industrial assurance which are illegal (*i.e.* prohibited by law), or which are not within their legal powers (*i.e.* unauthorised by their rules or memoranda, and hence *ultra vires*), are held to have made default in complying with the provisions of the Act of 1923, and are liable to pay to the owner of such policies in each case a sum equal to the surrender value of the policy (as ascertained under the Act [4]), or, where such policies were issued after the commencement of the Act, a sum equal to the amount of the premiums paid unless it is proved that, owing to false representations by the proposer in each case, the society or company did not know that the policy was illegal or beyond its legal powers.[5]

Section 4.—Industrial Assurance Companies and Collecting Societies.

365. Under the Act of 1923 [6] industrial assurance business may be carried on only by (*a*) a registered friendly society, referred to in the Act as a "collecting society," or (*b*) an assurance company within the meaning of the Assurance Companies Act, 1909, which is registered either under the Companies Acts or under the Industrial and Provident Societies Acts, 1893 to 1913, or incorporated by special Act. Such an assurance company is termed in the Act an "industrial assurance company." Under the Assurance Companies Act, 1909,[7] the term "assurance companies" is defined as including all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions, whether established before or after the commencement of the Act, and whether established within or without the United Kingdom, who carry on within the United Kingdom *inter alia* life assurance business—that is to say, the issue of, or the undertaking of, liability under policies of assurance upon human life, or the granting of annuities upon human life. A company registered under the Companies Acts which transacts business of this description in any part of the world is, by the same Act, deemed to be a company transacting such business within the United Kingdom.[8] And where a collecting society or industrial assurance company has ceased to effect industrial assurances, it is deemed to carry on industrial assurance business so long as it continues liable on the assurances previously effected.[9] Where an

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[1] *Wolenberg* v. *Royal Co-operative Collecting Society*, 1915, 84 L.J. K.B. 1316, 112 L.T. 1036.
[2] *Goldstein* v. *Salvation Army Assurance Society*, [1917] 2 K.B. 291.
[3] See Friendly Societies, s. 4, subs. (4).
[4] 1923 Act, s. 29.
[5] *Ibid.*, s. 5 (1).
[6] *Ibid.*, s. 1 (1).
[7] 1909 Act, s. 1 (*a*).
[8] *Ibid.*, s. 1.
[9] 1923 Act, s. 1 (3).

industrial assurance company carries on both industrial assurance business and other business, nothing in the Industrial Assurance Act, 1923, applies unless otherwise expressly provided, to any of the business of the company other than the industrial assurance business.[1] Such other business will therefore continue to be carried on by industrial assurance companies under the provisions of the Assurance Companies Act, 1909, or, in the case of collecting societies, under the provisions of the Friendly Societies Acts.

366. The carrying on of industrial assurance business by any body of persons which is not a collecting society or industrial assurance company as defined by the Act of 1923 is a statutory offence, and any director, manager, secretary, officer, or agent of any body illegally carrying on such business is liable to a maximum fine of £50 for each day during which the offence continues, and on conviction of a second offence to imprisonment, with or without hard labour, for a term not exceeding three months. In addition to these penalties, the offending body of persons is rendered liable to pay to the owner of a policy of industrial assurance issued by it a sum equal to the surrender value of the policy (to be ascertained in manner provided by the Act), or, if the policy were issued after the commencement of the Act, a sum equal to the amount of the premiums paid.[2]

Section 5.—Conduct of Business by such Companies and Societies.

Subsection (1).—*Commencement of Business.*

(i) *Deposits.*

367. Every assurance company and collecting society proposing to carry on industrial assurance business must, prior to the commencement of such business, deposit the sum of £20,000 with the Paymaster-General.[3] An assurance company must treat its industrial assurance as a separate class of business, and accordingly make a separate deposit in respect thereof.[4] The Paymaster-General will not accept a deposit except on a warrant of the Commissioner,[5] who may refuse to grant it to an assurance company if he considers it inexpedient that the particular company should be authorised to carry on industrial assurance business. Against such refusal the company has a right of appeal to the Court, and the Commissioner is entitled to appear and be heard on any such appeal.[6] The Commissioner is further empowered to make rules with respect to applications for warrants, and the payment, withdrawal, and transfer of deposits. These rules require parliamentary sanction.[7] The sum deposited is invested by the Paymaster-General in securities

[1] 1923 Act, s. 1 (1).
[2] *Ibid.*, s. 39 (4).
[3] *Ibid.*, ss. 7 (1), 12 (1); 1909 Act, s. 2 (1).
[4] 1923 Act, s. 12 (1).
[5] 1909 Act, s. 2 (5).
[6] 1923 Act, s. 2 (3) (*d*).
[7] 1909 Act, s. 2 (*b*); Industrial (Deposits) Rules, 1924; S.R.O., 1924, No. 754.

approved by the Court and selected by the company or society from the list of approved securities. The income derived from such investments is handed over to the company or society,[1] which must place it to the credit of its separate industrial assurance fund.[2]

368. A society registered and carrying on industrial assurance business at the passing of the Industrial Assurance Act, 1923, had to make its deposit before the commencement of the Act, except where the Commissioner, satisfied with its financial position, has exercised his power of postponing the time for making the deposit for successive periods of not more than five years at any one time.[3] A society to which the Commissioner has refused a period of postponement, may, with the leave of the Court, appeal to the Court of Session.[4] Since the commencement of the Act of 1923 every society must, prior to carrying on industrial assurance business, make its statutory deposit.[5] A society applying after the passing of the Act of 1923 for registry under the Friendly Societies Act, 1896, or for the registry of the amendments of its rules, if the proposed rules or amendments are such as to enable it to carry on industrial assurance business, must make the deposit before it receives from the Commissioner an acknowledgment of registry or of amendment of rules.[3] The Commissioner, on default by a collecting society in complying with these regulations regarding the statutory deposit, may award that the society be dissolved and its affairs wound up.[6] The society may appeal against this award to the Court of Session.[7] Where under the rules of a collecting society its management is vested in the committee of management of some other friendly society which was registered before 4th August 1921, the latter society may make the statutory deposit on behalf of the former society, or may guarantee the liabilities of the industrial assurance fund of the former society to the extent of £20,000 in such manner and subject to such amendment of its rules as the Commissioner may require.[8] A collecting society is not required to make a deposit in respect of any business other than industrial assurance business.[9]

369. On the sale of its industrial assurance business by one industrial assurance company to another, the statutory deposit can be transferred only under burden of the liabilities outstanding on the policies issued by the selling company in respect of the business so sold and transferred.[10]

(ii) *Name of Collecting Society.*

370. A collecting society which was registered after 31st December 1895, or which became a collecting society after the passing of the Industrial Assurance Act, 1923, must add to its name the words "collecting society," and must use its registered name only on all documents

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[1] 1909 Act, s. 2 (1). [2] *Ibid.*, s. 2 (4). [3] 1923 Act, s. 7 (1) (*c*).
[4] *Ibid.*, s. 7 (2). [5] *Ibid.*, s. 7 (1) (*d*). [6] *Ibid.*, s. 7 (3).
[7] *Ibid.*, s. 45 (2). [8] *Ibid.*, s. 7 (5). [9] *Ibid.*, s. 7 (1) (*f*).
[10] *United London and Scottish Insurance Co.* v. *Omnium Insurance Corporation*, 1914, 84 L.J. Ch. 777.

issued by it.[1] Failure to comply with this regulation is an offence under the Act.[2]

(iii) *Rules of Collecting Society.*

371. The rules of every collecting society must contain the nineteen provisions of the Industrial Assurance Act, 1923, mentioned in the First Schedule to that Act.[3]

SUBSECTION (2).—*The Industrial Assurance Fund.*

372. The provisions of the Assurance Companies Act, 1909, are now applied to industrial assurance business as carried on by assurance companies.[4] Accordingly the receipts derived from such business must be kept separate from those arising from other branches of the company's business, and must be carried to and form a separate fund—the industrial assurance fund.[5] This fund must form an absolute security for the holders of industrial assurance policies; is not to be liable for contracts of the company made in respect of any other class of insurance; and is not be to applied directly or indirectly for any purposes other than those of industrial assurance.[6] The rights of holders of industrial assurance policies effected with a company established before the commencement of the Industrial Assurance Act, 1923, and taken out before that date against the funds of the company are safeguarded and remain unaffected by the provisions of that Act.[7]

373. An industrial assurance company is forbidden, after the commencement of the Industrial Assurance Act, 1923, to issue any debentures or debenture stock, or raise any loan (except a temporary bank overdraft) charged or purporting to be charged on any of its assets in which the industrial assurance fund is invested; any such charge is void.[8]

374. So far as collecting societies are concerned, their rules must provide in each and every case (*a*) for the maintenance of a separate industrial assurance fund similar to that provided by statute in the case of an industrial assurance company (*q.v.*). The investments of such funds need not, however, be kept separate from the other investments of such a society;[9] (*b*) for the industrial assurance fund being absolutely the security of the owners of the industrial assurance policies, as in the case of the industrial insurance fund of an industrial assurance company (*q.v.*). The rights of persons interested in contracts entered into by a society before 14th February 1923 are, however, reserved;[10] and (*c*) for a separate valuation of the industrial assurance business of the society being made.[11]

SUBSECTION (3).—*Accounts and Returns.*

375. The accounts, as well as the funds of the industrial assurance business of an assurance company, must be kept separate from its other

[1] 1923 Act, s. 6. [2] *Ibid.*, s. 39 (1). [3] *Ibid.*, s. 8 (3). [4] *Ibid.*, s. 12 (3).
[5] 1909 Act, s. 3 (1). [6] *Ibid.*, s. 3 (2). [7] 1923 Act, s. 14. [8] *Ibid.*, s. 13.
[9] *Ibid.*, s. 8 (1) (*a*). [10] *Ibid.*, s. 8 (1) (*b*). [11] *Ibid.*, s. 8 (1) (*c*).

accounts and funds.[1] The company must send to the Commissioner copies (one of which must be certified by certain officers and officials) of its accounts, balance-sheet, and abstract relating to such business within six months after the close of the period to which these documents refer. A copy of the report submitted to the shareholders must also be sent to him.[2] A collecting society must, not later than 31st May in each year, send to the Commissioner an annual return of its receipts and expenditure, funds, and effects relating to its industrial assurance business.[3] A copy of its balance-sheet must be kept open for inspection, at every office at which the business of the society is carried on, for a period of seven days before the meeting at which the balance-sheet is to be presented, and a copy thereof must be delivered or posted on demand to every person interested in the funds of the society.[4] The Commissioner may reject any account, return, or balance-sheet sent to him by a society or company on the ground that it is incomplete, incorrect, or does not comply with statutory requirements, and may direct that it be amended.[5]

376. Accounts of an industrial assurance company not subject to audit in accordance with the provisions of the Companies Acts, must be audited annually in such manner as the Commissioner may prescribe.[6] A copy of every auditor's report must be sent to the Commissioner.[7] The audit of the accounts of a collecting society is regulated under the Friendly Societies Act, 1896. The audit must be made annually by a public auditor appointed under that Act.[8]

377. The Commissioner, if he suspects that an offence against the Friendly Societies Act, 1896, the Assurance Companies Act, 1909, or the Industrial Assurance Act, 1923, has been, or is likely to be committed, may by himself or an inspector examine into the affairs of any society or company, and as a result of investigation may award that the society be dissolved and its affairs wound up, or may present a petition to the Court for the winding-up of the company. He may also direct that the expenses of such an investigation should be defrayed out of the funds of the society or company, or by the officers, members, or board of directors of the society or company.[9] The society may appeal against an award of dissolution to the Court of Session;[10] and any society, company, or person directed to pay any part of the expenses of an investigation may, with leave of the Court, appeal against the direction of the Commissioner to the Court of Session.[11]

Subsection (4).—*Valuations.*

378. Every valuation made by a collecting society or industrial assurance company is, under the Industrial Assurance Act, 1923,[12]

[1] 1909 Act, s. 3 (1).
[2] *Ibid.*, s. 7; 1923 Act, s. 12 (2).
[3] 59 & 60 Vict. c. 25, s. 27; 1923 Act, s. 2 (1).
[4] 1923 Act, s. 15 (1).
[5] *Ibid.*, s. 16 (1).
[6] 1909 Act, s. 9; 1923 Act, s. 12 (2).
[7] 1923 Act, s. 12 (3) (*c*).
[8] 59 & 60 Vict. c. 25, s. 26; 1923 Act, s. 15 (2).
[9] 1923 Act, s. 17.
[10] *Ibid.*, s. 45 (2).
[11] *Ibid.*, s. 17 (3).
[12] *Ibid.*, s. 18.

subject to the following statutory provisions: The valuation must be made by an actuary possessing such qualifications as may be prescribed by rules made by the Commissioner.[1] The basis of valuation must be such as to place a proper value upon liabilities, and must secure that no policy is treated as an asset. The report containing the abstract of the result of the valuation required under the Act[2] must be sent by a collecting society to the Commissioner within twelve months after the close of the period to which the valuation refers, and must contain certain details and a certificate regarding securities and assets. Where sums representing expenses of organisation, extension, or the purchase of business or goodwill are included in the assets appearing in the balance-sheet of a society or company, and the nett amount of the assets, exclusive of such sums, is less than the amount of the industrial assurance fund or of the several assurance and insurance funds as shown in the balance-sheet, the amount of the industrial assurance fund shown in the valuation balance-sheet must be reduced by the amount of the deficiency or by a sum by way of deficiency in proportion to the various assurance and insurance funds so shown. This provision dealing with reduction of the industrial assurance fund is applied to certain specified cases for a limited period. The valuation balance-sheet must by a note give particulars of all debentures or loans charged on any assets of the company in which the industrial assurance fund is invested. The debentures must have been issued and the loans raised prior to the commencement of the Act of 1923, as under s. 13 of that Act any debenture or loan so issued or raised is prohibited after the Act is in force.

379. If the Commissioner is satisfied that any of the statutory provisions with regard to a valuation have not been complied with, or that the industrial assurance fund as stated in the valuation balance-sheet is greater than the value of the assets available for the liabilities of that fund, he may reject the valuation and order its alteration to conform with the statutory regulations. His decision is, however, subject to appeal to the Court of Session by the society or company. In addition to such information as a society is required to furnish under the Friendly Societies Act, 1896, s. 23, or a company must furnish under the Assurance Companies Act, 1909, the Commissioner may demand all or any of the particulars mentioned in the second schedule to the Act of 1923, with such explanations as he may consider necessary in order to satisfy himself whether the valuation complies with the provisions of the Act. If a valuation discloses a deficiency, the Commissioner may, if after investigation he is satisfied that the society or company should cease to carry on industrial assurance business, award that the society be dissolved and its affairs wound up, or, in the case of a company, present a petition to the Court for the winding-up of the

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[1] 1909 Act, s. 29; 1923 Act, s. 12 (2).
[2] 59 & 60 Vict. c. 25, s. 28.

company. A society has a right of appeal to the Court of Session against an award by the Commissioner.[1]

Subsection (5).—*Meetings.*

380. Every collecting society and industrial assurance company must hold at least one general meeting in every year (*i.e.* every calendar year beginning on 1st January and ending on 31st December [2]). Notice of the day, hour, and place of the meeting (unless where these are fixed by the rules), and the objects of the general meeting must be given, either by advertisement in at least two of the newspapers in general circulation in every county where the society or company carries on business, or by service upon every member. The advertisements must be published or the notices served at least fourteen days before the day of the meeting. A copy of the notice must be displayed in every office of the society or company for a similar period.[3] There is no power to postpone a general meeting properly convened.[4]

Subsection (6).—*New Business.*

381. A collecting society or industrial assurance company or their employees are expressly prohibited from employing any other person not in the regular employment of the society or company to procure or endeavour to procure anyone to enter into a contract of industrial assurance. The term "regular employment" includes regular part-time as well as regular whole-time employment.[5] A collector may appoint a deputy to collect for him during his temporary absence, but such a deputy must not solicit new business unless he is in fact in regular employment with the society or company.

Section 6.—Policies of Industrial Assurance.

Subsection (1).—*Proposals for Policies.*

382. For the purpose of preventing insurances of persons in whose lives the proposers have no insurable interest, it is provided by the Industrial Assurance Act, 1923, that every proposal must contain a declaration by the person whose life is to be assured that the policy is to be taken out by him, and that the premiums thereon are to be paid by him except (*a*) where the policy is taken out on the life and on behalf of a child under the age of sixteen, (*b*) where the policy assures a payment of money for the funeral expenses of parent, child, grandparent, grandchild, brother, or sister, or (*c*) where the person whose life is to be insured under the policy is a person in whom the proposer has an insurable interest, in which case the proposal must contain a statement of the nature of the interest.[6] It is the duty of the society or company to see

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[1] 1923 Act, s. 45 (2). [2] *Gibson* v. *Barton*, 1875, 10 Q.B.D. 329. [3] 1923 Act, s. 19.
[4] *Smith* v. *Paringa Mines*, [1906] 2 Ch. 193. [5] 1923 Act, s. 34. [6] *Ibid.*, s. 20 (1).

that no proposal form is issued or proposal accepted which does not comply with these conditions.[1] A society or company is liable under a policy effected upon a proposal in which an untrue statement was made that the person whose life is proposed to be assured was not at that time assured under another policy effected with the same society or company.[2]

383. Where a proposal form has been filled in wholly or partly by a person employed by a society or company, such person is regarded as an agent for his society or company, so that his principals are not entitled to question the validity of the policy founded upon the proposal on any ground of misstatement made in the proposal form, except where the proposer has made a fraudulent statement in some material particular. The society or company may, however, adjust the terms of a policy where a misstatement has been made in the proposal form as to the age of the person whose life is proposed to be assured. The society or company have also the right to question the validity of a policy within two years from its date upon the ground of a misstatement as to the state of health of the assured made in the proposal form.[3] An applicant for a policy by his signature to the proposal form is held to have read and adopted the answers therein contained, even where such answers were filled in by an agent for the assurance company and many of them were false in material respects; and the policy was held to be void, even although the applicant had not read the answers in the proposal form and had not authorised them to be made.[4] A policy will not, however, be voided on the ground that statements made in the proposal form were false in material respects if it be proved that such statements were unauthorised by the applicant, and that the form was not in point of fact signed by him or on his behalf.[5] A company which had issued a policy expressed to be issued in consideration of the applicant having signed a proposal, such proposal being the basis of the contract, and had received payment of premiums in respect of such policy, was held barred from contending that in consequence of the want of a proposal there was no contract, even where the holder of the policy admitted in evidence that there had been no proposal at all.[5]

Subsection (2).—*Terms of Policies.*

384. Every industrial assurance policy issued after the commencement of the Act of 1923 must set out the provisions of the Act mentioned in the Third Schedule thereof, and of these the provisions contained in Part II. of the Schedule, which relate to forfeiture of policies, must be printed in distinctive type. In the case of a policy on the life of a child under ten years of age, the policy must set out in similar type a statement of the effect of s. 65 of the Friendly Societies Act, 1896, which

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[1] 1923 Act, s. 20 (2). [2] *Ibid.*, s. 20 (3). [3] *Ibid.*, s. 20 (4).
[4] *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516.
[5] *Pearl Life Assurance Co.* v. *Johnson*, [1909] 2 K.B. 288.

deals with the conditions under which a registrar of deaths may grant certificates of death in the cases of children aged from three to ten years. A statement approved by the Commissioner may be inserted in the policy in lieu of setting out the statutory provisions.[1] The Commissioner has prepared an approved statement which can be so used. A society or company issuing a policy of industrial assurance which does not comply with this provision is guilty of an offence against the Act, and is liable to pay to the person paying the premium a sum equal to the amount of the premiums paid, and this sum can be recovered summarily as a civil debt.[2]

Subsection (3).—*Forfeiture of Policies.*

385. A member or person assured in a collecting society or industrial assurance company in default in payment of his premium does not forfeit his policy until (*a*) he has had served upon him a notice stating the amount due from him, and informing him that on his failure to pay this amount within twenty-eight days (exclusive of the day on which the notice was served [3]) and at a place specified in the notice his interest or benefit will be forfeited, and (*b*) default has been made by him in payment in accordance with the notice.[4] The notice must be in writing and be delivered or sent by post to the member in default, or be left at his last known place of abode.[5] In a case quoted in the Annual Report of the Industrial Assurance Commissioner of 1924, it was held that a company, by accepting the payment of part of the arrears during the period of twenty-eight days, did not thereby waive its right to the forfeiture of the policy.[6] Payment of the stipulated number of contributions by a member is the only condition upon which his right to a benefit can arise, and accordingly, where a member, having paid a certain number of contributions to a friendly society (in whose rules were incorporated provisions as to forfeiture of policies similar to those of s. 23 of the Industrial Assurance Act, 1923), thereafter changed his address and ceased to pay any further contributions, it was held that his widow was not entitled, on the plea that the society's collector had not called to receive contributions, to claim the benefit to which she would have been entitled had all the payments been made.[7] The issue of a second notice of forfeiture cancels the previous notice.[8]

386. The owners of forfeited policies taken out for certain periods upon which a specified number of premiums has been paid, are, on making application to their societies or companies within one year from the date of the service of the notices of forfeiture, entitled to obtain in each case either a free paid-up policy (the amount of which

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[1] 1923 Act, s. 2 1 (1).
[2] *Ibid.*, s. 21 (2).
[3] *Radcliffe* v. *Bartholomew*, [1892] 1 Q.B. 161.
[4] 1923 Act, s. 23.
[5] *Ibid.*, s. 41.
[6] *Re Conlon and Britannic Assurance Co.*, [1924] 1 A.C. 102.
[7] *Taylor* v. *Collins*, 1882, 46 L.T. 168.
[8] *Re M'Clure and Salvation Army Assurance Society*, [1924] 1 A.C. 98.

is to be ascertained according to statutory rules [1]), or in specified cases the surrender value of the forfeited policy. The owner of a forfeited policy can, however, in lieu of his statutory rights, claim any rights due to him under the rules of a society or the conditions of his policy where such rights are more favourable to him than his statutory rights.[2]

SUBSECTION (4).—*Substitution and Transfer of Policies.*

(i) *Substitution.*

387. Where the owner of an industrial assurance policy agrees to accept a new policy in substitution therefor, the collecting society or industrial assurance company must pay to him the surrender value of the old policy, or give to him a free paid-up policy of equivalent value unless the value of the substituted policy at the date of substitution is equal to or exceeds such surrender value,[3] in which case, for the purposes of determining whether the owner is entitled to a free paid-up policy or surrender value under the statutory provisions relating to forfeited policies, the substituted policy is deemed to have been issued at the date at which the old policy was issued, and premiums are deemed to have been paid on the substituted policy in respect of the period between that date and the date at which the substituted policy was actually issued.[4] The surrender value of a substituted policy is reckoned as 75 per cent. of the value of the policy as calculated in accordance with the rules set out in the Fourth Schedule to the Industrial Assurance Act, 1923.[5] In the case of a substitution of a policy, the society or company must furnish the owner of the policy with the new policy and premium receipt book, or statement setting forth his statutory rights, and an account by a competent official of the society or company showing the surrender value of the old and the value of the new policy.[6]

(ii) *Transfer.*

388. The written consent (in prescribed form [7]) of a member or person assured with a collecting society or industrial assurance company is required to any transfer from such society or company, which thereby makes him a member of or assured with any other such society or company. In the case of an infant, consent to such a transfer must be given in writing by his parent or other guardian. For purposes of the Act, a transference does not include (*a*) as regards a collecting society, an amalgamation, transfer of engagements, or conversion into a company under the Friendly Societies Act, 1896, or the Industrial Assurance Act, 1923, or (*b*) as regards an industrial assurance company, an amalgamation or transfer of business under the Assurance Companies Act, 1909, or the Act of 1923.[8] The latter Act contains the regulations with which the transferring and transferee societies and companies must comply.[9]

[1] 1923 Act, s. 24 (2).
[2] *Ibid.*, s. 24.
[3] *Ibid.*, s. 25 (1).
[4] *Ibid.*, s. 25 (3).
[5] *Ibid.*, s. 29.
[6] *Ibid.*, s. 25 (2).
[7] S.R. & O., 1923, No. 1495.
[8] 1923 Act, s. 26 (1) and (2).
[9] *Ibid.*, s. 26 (2) and (3).

Written consent by the member or person assured is essential to a valid transfer.[1] Notice of a proposed transfer must be given within seven days from the date when the written consent to the transfer has been signed, by the society or company to which the assured is sought to be transferred to the society or company from which the assured is sought to be transferred. Such notice is imperative, and failure to give it is a statutory offence.[2]

Subsection (5).—*Payment of Claims.*

389. A claim arising out of a policy of industrial assurance is not subject to any deduction on account of arrears of premiums due under any other policy.[3]

Subsection (6).—*War Bond Policies.*

390. These policies are defined under the Industrial Assurance Act, 1923, as policies of life assurance, whether industrial assurance policies or not, where the amounts assured are payable in any securities issued in connection with any government loan raised for the purposes of the War, or in such securities or in cash at the option of the owners of the policies. An owner of such a policy can apply to the Commissioner on the ground that the conditions of his policy are so unreasonable as to entitle him to claim relief. The Commissioner, after giving the society or company an opportuinity of being heard, may, upon consideration, direct that as far as relates to lapse and surrender the policy and all other similar policies issued by the same society or company shall be modified in such manner as appears to him to be just. Any society or company may appeal to the Court of Session against the Commissioner's finding and direction.[4]

Subsection (7).—*Saving for certain Policies issued before 3rd December* 1909.

391. For the purpose of safeguarding the rights of owners of policies issued prior to the commencement of the Assurance Companies Act, 1909, it is provided by the Industrial Assurance Act, 1923, that no policy effected before that date (3rd December 1909) with a collecting society or an industrial assurance company shall be deemed to be void by reason only that (*a*) the person effecting the policy had not, when it was taken out, an insurable interest in the life assured, or (*b*) the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or (*c*) the assurance was not one authorised by the Acts relating to friendly societies,

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[1] *Refuge Assurance Co.* v. *Hannan*, 1889, 2 White 373.

[2] *Bell* v. *Harker*, [1928] 1 K.B. 368; *Pearl Life Assurance Co.* v. *Scottish Legal Life Assurance Society*, [1901] 1 K.B. 528; *Salvation Army Life Assurance Society* v. *British Legal Life Assurance Co.*, 1908, S.C. 1138.

[3] 1923 Act, s. 27.

[4] *Ibid.*, s. 30.

provided that the policy was effected by or on account of a person who had at the time a *bona fide* expectation that he would incur expenses in connection with the death or funeral of the insured, and that the sum assured is not unreasonable for the purpose of covering those expenses. Such a policy will enure for the benefit of the person on whose behalf it was effected or his assigns.[1] This statutory provision does not, however, affect a person's right to claim rescission of the policy on the ground that he had been induced to effect it by the fraudulent representation that he had an insurable interest on the life of the person insured in respect of the expenses therein mentioned.[2]

Section 7.—Disputes.

392. The Industrial Assurance Act, 1923 (s. 32), provides explicit methods of determining all disputes between a collecting society or industrial assurance company and (*a*) any member or person assured, or (*b*) any person claiming through a member or person assured, or in respect of any policy or under the Act, or (*c*) any aggrieved person who has ceased to be a member, or any person claiming through him. Such a member or person may either (1) proceed under and in accordance with the rules of the society or company, or (2) notwithstanding any rule of the society or company to the contrary, apply either to the County Court or to a Court of Summary Jurisdiction (either Court being in Scotland the Sheriff Court) for the place where he resides, but only to a Court of Summary Jurisdiction if the amount of his claim does not exceed £25, and provided that not less than fourteen days' notice of the application has been given to the society or company. The Court may then settle the dispute according to the provisions of the Friendly Societies Act, 1896,[3] and when the dispute is so settled by a Court of Summary Jurisdiction it may make such order as to costs as it considers fair. This provision, while giving jurisdiction to the Sheriff Court, does not exclude the jurisdiction of the Supreme Court.[4] The jurisdiction of the Court to settle such a dispute was maintained where the widow of the owner of a policy had signed an agreement settling for a small sum a claim against an assurance company but at the time of signature she was unable to appreciate whether or not there was good ground for dispute.[5]

393. Any such dispute may be referred to the Commissioner (*a*) by a society or company, member, or person as aforesaid if the claim does not exceed £50, and the legality of the policy is not questioned, and fraud or misrepresentation is not alleged, and (*b*) in any case by both parties without any restriction as to the amount of the claim or the

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[1] 1923 Act, s. 31; *Da Costa* v. *Prudential Assurance Co.*, 1918, 88 L.J. K.B. 884.
[2] *Tofts* v. *Pearl Life Assurance Co. Ltd.*, [1915] 1 K.B. 189.
[3] 59 & 60 Vict. c. 25, s. 68 (6) and (7).
[4] *Re Royal Liver Friendly Society*, 1887, 35 Ch. D. 332.
[5] *Refuge Assurance Co., Ltd.* v. *Lawrence*, 1903, 67 J.P. 396; see also Friendly Societies, s. 5, Disputes.

nature of the question to be decided. The Commissioner may deal with such a referred dispute as if the reference was made under the provisions of the Friendly Societies Act, 1896 (s. 68), and the consent of the Treasury to his dealing therewith had been given.[1] Where there is a doubt as to the survival of an assured person the Commissioner has power, on the application of the owner of the policy or the society or company which issued the policy, to award payment to the owner of its surrender value as at the time of the award.[2]

Section 8.—Amalgamations, Transfers, and Conversions of Societies and Companies.

Subsection (1).—*Amalgamations and Transfers.*

(i) *Collecting Societies.*

394. Under the Industrial Assurance Act, 1923,[3] s. 70 of the Friendly Societies Act, 1896, is applied to an amalgamation and transfer of engagements of collecting societies. The application of the section is, however, subject to two modifications: (1) before the assent of the members of the societies concerned is sought to be obtained,[4] each member must be furnished with particulars of the amalgamation or transfer and certain other details; and (2) an amalgamation or transfer must be sanctioned by the Commissioner, who shall hear any representations made by any interested person who alleges that the proposed scheme will adversely affect him. The section, as thus modified, applies to the transfer by a collecting society of its engagements to an industrial assurance company.[5]

(ii) *Industrial Assurance Companies.*

395. The Industrial Assurance Act, 1923, applies the provisions of the Assurance Companies Act, 1909 (ss. 13, 14, and 23), relating to the transfer of industrial assurance business from one industrial assurance company to another, as amended, to the transfer of such business from a company to a collecting society.[6] The sanction of the Court is required to such a transfer,[7] and the procedure is by petition. The Court may refuse to grant such a transfer on grounds other than those stated against it in Court, and may refuse the petition even where it is unopposed.[8]

Subsection (2).—*Conversion of a Collecting Society into an Industrial Assurance Company.*

396. Such a conversion is regulated by the provisions of s. 71 of the Friendly Societies Act, 1896, as modified by the Industrial Assurance Act, 1923.[9] The chief modifications introduced by the latter Act are

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[1] 1923 Act, s. 32 (1); 59 & 60 Vict. c. 25, s. 68 (2), (3), (4).
[2] 1923 Act, s. 32 (2).
[3] 1927 Act, s. 36 (1).
[4] 59 & 60 Vict. c. 25, s. 70 (3).
[5] 1923 Act, s. 36 (2).
[6] *Ibid.*, s. 37.
[7] *Ibid.*, s. 12 (3) (*e*), (*f*).
[8] *Re Hearts of Oak Assurance Co., Ltd.*, 1914, 30 T.L.R. 436.
[9] 1923 Act, s. 38.

(1) the Commissioner must receive a copy of the special resolution of conversion passed by the society, (2) the Commissioner may, within one month after the receipt of this copy, notify the society in writing that he objects to the proposed conversion, and (3) on his refusal to approve of the proposed scheme of conversion such a scheme can be carried through only with the sanction of the Court of Session, to whom application, by petition, must be made, (4) the Commissioner is entitled to appear in any application to the Court, and (5) the Court may give directions for settling a proper memorandum and articles of association for the new company.[1] The committee of management of a collecting society having more than 100,000 members may also, on satisfying the Court that 55 per cent. at least of its members have, by a poll, agreed to the conversion, petition the Court to make an order for its conversion into a mutual assurance company.[2]

Section 9.—Offences and Penalties.

397. Any collecting society which contravenes or fails to comply with any of the provisions of the Industrial Assurance Act, 1923, or any of the directions of the Commissioner given thereunder, is guilty of an offence under that Act and the Friendly Societies Act, 1896.[3] The maximum penalty to be inflicted under the Industrial Assurance Act, 1923, is a fine not exceeding £100, or, in the case of a continuing offence, a fine not exceeding £50 a day during which the offence continues.[4] Any industrial assurance company contravening or failing to comply with any of the provisions of the Industrial Assurance Act, 1923, or with the Commissioner's directions made thereunder, is guilty of an offence under that Act, and shall be liable to the like penalties as in the case of a default in complying with the requirements of the Assurance Companies Act, 1909.[5] Summary proceedings for offences under the Industrial Assurance Act, 1923, or under the Friendly Societies Act, 1896, in the case of a collecting society and any of its officers may be commenced at any time within one year after the discovery by the Commissioner of the offence, but in no case more than three years from the commission of the offence.[6]

Section 10.—Legal Proceedings.

398. As to legal proceedings with regard to collecting societies, see Friendly Societies.[7] In regard to assurance companies, see Insurance (Life).

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[1] 1923 Act, s. 38 (1), (3).
[2] *Ibid.*, s. 38 (2); see also Friendly Societies, s. 3, subs. (4), Conversion.
[3] See Friendly Societies, s. 7, Offences and Penalties.
[4] 1923 Act, s. 39 (1).
[5] *Ibid.*, s. 39 (2); 1909 Act, s. 23.
[6] 1923 Act, s. 39 (5).
[7] Sec. 8, Vol. VII. p. 395, *ante*.

INDUSTRIAL SCHOOLS.

See EDUCATION.

INDUSTRIAL AND PROVIDENT SOCIETIES.

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Section 1.—Introduction.

399. The first Act which specially dealt with societies of this kind was the Industrial and Provident Societies Act, 1852,[1] afterwards amended by Acts passed in 1854 and 1856. A large number of societies were formed under these Acts, which were consolidated and amended by the Industrial and Provident Societies Act, 1862.[2] It was found necessary to make amendments to this Act in 1867, and again in 1871. The Industrial and Provident Societies Act, 1876,[3] had for its aim the consolidation of the law relating to co-operative societies, and its assimilation to some extent with the law relating to friendly societies. The societies which were entitled to be registered were societies for carrying on any labour, trade, or handicraft, whether wholesale or retail, including the buying and selling of land, but as to the business of banking subject to the restrictions contained in the Act. Such societies continued to be corporate bodies, but the privilege of exemption from stamp duties, enjoyed by friendly societies, was finally withdrawn from co-operative societies.

400. The Industrial and Provident Societies Act, 1893,[4] once more consolidated and amended the law though it did not make important material changes. The definition was amended with the probable effect of extending the scope of the Act, and a number of modifications and amendments were introduced. Further amendments were made by Acts passed in 1894, 1895, and 1913, so that the law is now regulated by the Industrial and Provident Societies Acts, 1893 to 1913.[5] The Act of 1893 will be referred to as the principal Act, and unless stated otherwise the sections quoted refer to it.

General Authority.—Fuller on Friendly Societies, 4th ed.

[1] 15 & 16 Vict. c. 31. [2] 25 & 26 Vict. c. 87. [3] 39 & 40 Vict. c. 45.
[4] 56 & 57 Vict. c. 39. [5] 3 & 4 Geo. V. c. 31, s. 12.

Section 2.—Societies which may be registered.

401. Under the Act an industrial and provident society is defined as "a society for carrying on any industries, businesses, or trades specified in or authorised by its rules, whether wholesale or retail, and including dealings of any description with land." [1] But the Act further provides (*a*) that no member other than a registered society can have an interest in the shares exceeding £200, and (*b*) that in regard to the business of banking the society shall be subject to certain provisions in the Act. The shares of a society may therefore be held by another registered society,[2] or by any other body corporate; [3] but unless the latter is registered the amount is limited to £200.[4]

402. A society registered under this Act may be a public utility society within the definition of the Housing (Scotland) Act, 1925, *i.e.* "a society registered under the Industrial and Provident Societies Acts, 1893 to 1913, or any amendment thereof, the rules whereof prohibit the issue of any share or loan capital with interest or dividend exceeding the rate for the time being prescribed by the Treasury." [5] The Housing (Scotland) Act makes provisions, under two sections,[6] for assistance to such public utility societies in the erection, improvement, and management of dwelling-houses for the working classes from local authorities or county councils, and also from the Public Works Loans Commissioners. Provisions are also made in the Small Holdings and Allotments Acts, 1905 to 1919, for assistance to registered societies formed for that purpose; [7] and registered societies which are agricultural credit societies approved by the Minister of Agriculture and Fisheries may obtain advances under the Agricultural Credits Act, 1923.[8]

Section 3.—Provisions similar to those of Friendly Societies.

403. In many respects the provisions of the Act are similar to those contained in the Friendly Societies Acts. The main points of difference are: (1) such as arise from the fact that industrial and provident societies are incorporated bodies, while friendly societies are not, but act through trustees. A registered industrial and provident society may therefore sue and be sued in its corporate name; [9] (2) that they are not, like friendly societies, now exempt from stamp duty.

404. The statutory provisions for industrial and provident societies, which are similar to and often identical with those under the Friendly Societies Acts, relate to—

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[1] Sec. 4. [2] Sec. 38. [3] Sec. 42.

[4] But see Housing (Scotland) Act, 1925 (15 Geo. V. c. 15), s. 57 (2); and Agricultural Credits Act, 1923 (13 & 14 Geo. V. c. 34), Schedule, Parts I. and II.

[5] 15 Geo. V. c. 15, s. 119. [6] *Ibid.*, ss. 57 and 73.

[7] Land Settlement Facilities Act, 1919 (9 & 10 Geo. V. c. 59), s. 25, Schedule II.

[8] 13 & 14 Geo. V. c. 34, ss. 1, 2, and Schedule. [9] Sec. 21.

(*a*) Registry of the society and the cancelling and suspension of the registry; rules and amendments, and duties of registered societies; [1] but s. 7 (1) is repealed by the Amendment Act, 1895,[2] which substitutes new provisions in regard to appeals from refusal to register. Secs. 3, 4, and 6 of the Friendly Societies Act, 1896, relating to the duties of registrars and assistant registrars,[3] are incorporated with this Act.[4] With regard to the rules of a registered society it should be noted that while, like friendly societies, the rules must contain all the provisions set forth in the schedule, these provisions, owing to the different nature and objects of an industrial and provident society, and the fact that it is a corporate body, differ in some respects from those prescribed in the schedule of the Friendly Societies Act, 1875.[5]

(*b*) Power of nomination by members.[6]

(*c*) Member's right to inspect the society's books; [7] but this right is not so extensive as under the Friendly Societies Acts.

(*d*) Payments on intestacy (with a slight difference in the case of an illegitimate member).[8] By the 1913 Act, s. 27 was amended, a new section was substituted for s. 28, and the words "not exceeding one hundred pounds" were omitted from s. 29.

(*e*) Membership of minors, except that the minor must not be under the age of sixteen.[9]

(*f*) Security to be given by officers, except that the society is not bound to take a surety.[10]

(*g*) Settlement of disputes.[11]

(*h*) Inspection of society's affairs.[12]

(*i*) Change of name, amalgamation, and conversion of society into a company, or of a company into a society.[13]

An important difference has to be noted from the corresponding provision for friendly societies in regard to the majority required for passing a special resolution. Under this Act it is a majority of not less than three-fourths of such members entitled to vote as may have voted in person or by proxy at the meeting, whereas in the case of friendly societies it is a majority of not less than three-fourths of such members entitled to vote as may be present at the meeting.

(*j*) Termination of society by an instrument of dissolution.[14]

(*k*) Offences, penalties, and legal proceedings.[15]

(*l*) Power of Treasury to issue regulations for carrying out the Act.[16]

These matters have already been dealt with under the subject of Friendly Societies,[17] and it is sufficient here to refer to them.

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[1] Secs. 5 to 16.
[2] 58 & 59 Vict. c. 30, s. 3.
[3] 59 & 60 Vict. c. 25.
[4] Sec. 76.
[5] 38 & 39 Vict. c. 60.
[6] Secs. 25, 26, as amended by the 1913 Act, s. 5.
[7] Sec. 17.
[8] Secs. 27–31.
[9] Sec. 32.
[10] Sec. 47.
[11] Sec. 49.
[12] Sec. 50.
[13] Secs. 51–57.
[14] Secs. 58 (*b*) and 61; see 1913 Act, s. 8.
[15] Secs. 62 to 70, as amended by 1913 Act, ss. 10 and 11.
[16] Sec. 74.
[17] See Vol. VII. p. 395, *ante*.

Section 4.—Banking by Societies.

405. Where a society has any withdrawable share capital, it is prohibited from carrying on the business of banking. But societies taking deposits of not more than ten shillings in any one payment, nor more than £20 from any one person, payable on not less than two clear days' notice, are not carrying on the business of banking within the meaning of the Act. A society for banking must keep a half-yearly statement of its funds conspicuously hung up in every place of business.[1]

Section 5.—Incorporation of Society.

406. An industrial and provident society by registration becomes a body corporate, capable of suing and being sued by its registered name, with perpetual succession, and a common seal, and with limited liability. Any property vested in any person in trust for the society shall vest in the society.[2]

Section 6.—Recovery of Debts from Members.

407. All sums payable by members are declared to be debts to the society and recoverable in the Sheriff Court of the district in which the registered office of the society is situate, or in that of the district in which such member resides, at the option of the society.[3] The corresponding provision in the Friendly Societies Act limits the jurisdiction to the Court of the district in which the member resides.[4] The society has a lien over a member's shares for any debt due to it by him, and may set off any sum credited to the member thereon in or towards payment of such debt.[5] It has been held that so long as the society is carrying on business it may set off a sum credited to a member on his shares towards payment of a debt due by him, though at the time the committee were aware of the insolvency of the society.[6]

Section 7.—Exemption from Income Tax.

408. A registered society is entitled to exemption from tax under Schedules (C) and (D) of the Income Tax Acts, unless it sells to persons not members, and the number of shares of the society is limited either by its rules or its practice. But no member of or person employed by the society shall be exempt from charge to the tax to which he would be otherwise liable.[7] Accordingly where the number of shares of a society is limited it must sell only to members in order to escape payment of income tax. The section was held not to apply to a society which occupied land for husbandry only, and elected to be assessed for

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[1] Sec. 19. [2] Sec. 21. [3] Sec. 23 (1).
[4] 38 & 39 Vict. c. 60, s. 31 (2). [5] Sec. 23 (2).
[6] *Re Gwawr-y-Gweithyr Industrial and Provident Society*, [1901] 2 K.B. 477.
[7] *Tranent Co-operative Society* v. *Brown*, 1921 S.C. 219.

income tax in respect of such lands under Schedule (D), instead of under Schedule (B).[1]

Section 8.—The Register as Evidence.

409. The register is *prima facie* evidence of (*a*) the designation of the member, the number of shares held by him, the numbers of such shares, and the amount paid on them; (*b*) the date he became a member; (*c*) the date he ceased to become a member.[2]

Section 9.—Bills of Exchange and Contracts in Name of the Society.

410. Where a promissory note or bill of exchange has been made, accepted, or endorsed in the name of a society, or by or on behalf or account of a society, by a person authorised by the society, it shall be deemed to have been made, accepted, or endorsed on behalf of the society.[3] A similar provision is made in the Companies Acts. The provisions dealing with contracts are also adopted from the Companies Acts, and give contracts by a society the same validity as those between private persons. All contracts made conform to these provisions shall be effectual and binding in law on the society, and all other parties thereto, their heirs, executors, and administrators, as the case may be.[4]

Section 10.—Investments, and Execution of Deeds.

411. Increased powers of investing are given to societies, and the Act further ratifies and confirms all investments made before the passing of the Act which would have been valid had the Act been in force.[5] Power is also given to a society not chargeable with income tax to invest in saving banks,[6] and to make advances to members.[7] Such advances must be authorised by the rules, and only on security of property, except where societies are carrying on banking business. There are special regulations for advances to members of agricultural societies.[8] Special regulations are made for simplifying the discharge by societies of heritable securities in Scotland, it being enacted that the registration in the appropriate Register of Sasines of a receipt in full, signed by the members of the committee and countersigned by the secretary, shall be sufficient to discharge the bond and disburden the property. But the forms and procedure under the Conveyancing Acts may be adopted if preferred.[9] A deed by a society in Scotland is duly

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[1] Income Tax Act, 1918 (8 & 9 Geo. V. c. 40), s. 39 (4), replacing s. 24 of the Act.
[2] Sec. 34.
[3] Sec. 33; see *Dey* v. *Pullinger Engineering Co.*, [1921] 1 K.B. 77.
[4] Sec. 35.
[5] Sec. 38.
[6] Sec. 39; see Income Tax Act, 1918, s. 39 (4).
[7] Sec. 40.
[8] Agricultural Societies Act, 1923 (13 & 14 Geo. V. c. 34), Schedule, Part II, 5.
[9] Sec. 44.

executed if subscribed by two members of committee and the secretary, whether attested by witnesses or not.[1]

Section 11.—Liability of Members in Winding-up.

412. Where a society is wound up in pursuance of an order or resolution, the liability of present and past members of the society for the society's debts and liabilities, the expenses of winding-up, and the adjustment of the rights of contributories among themselves, is qualified in certain respects. Thus a member (who may be an individual, society, or company) is not liable to contribute—

(*a*) Where he has ceased to be a member for a year prior to the commencement of the winding-up.

(*b*) Where the debt or liability was contracted after he ceased to be a member.

(*c*) Where he is no longer a member, unless the contributions of the existing members are insufficient.

(*d*) Beyond the amount, if any, unpaid on the shares held by him. Membership ceases from the date of the notice or application for withdrawal.[2]

The amending Act of 1895 provides that in all proceedings in winding up a society in Scotland under the Act the Court having jurisdiction shall be the Sheriff Court. This Act further assimilates appeals for refusal to register to those under the Friendly Societies Acts, so that appeal is now made in the first instance to the chief registrar, and if he refuses, then to the Court of Session.[3]

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[1] Sec. 46. [2] Sec. 60. [3] 58 & 59 Vict. c. 30, ss. 2 and 3.

INFEFTMENT.

See CHARTER (FEUDAL); COMPLETION OF TITLE; DISPOSITION.

INHIBITION.

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Section 1.—Meaning of Term.

413. Inhibition is a personal prohibition, at the instance of a creditor, restraining the person inhibited from contracting any debt, or granting any deed, by which any part of his lands may be alienated to the prejudice of the inhibitor.[1] It is available either as an intermediate security employed while the creditor's claim is future or contingent or still in dependence, or as part of the execution by a creditor for a debt already liquidated, payment of which he is about to enforce by diligence.[2] The former is known as inhibition in security, and the latter as inhibition in execution, although strictly speaking inhibition, even when used on a decree, is not "in execution," but merely a prohibitory diligence. Inhibition corresponds closely to arrestment in the case of moveables, and to a large extent is governed by the same rules.

A general mandate to an agent to recover a debt includes authority to use inhibition.[3]

Section 2.—Grounds of Inhibition.

Subsection (1).—*Inhibition in Execution.*

414. Inhibition in execution may proceed on a liquid document of debt, such as a bond, bill, or decree, provided that it is *ex facie* regular

General Authorities.—Stair, iv. 50; iv. 20, 28; iv. 35, 21; Ersk. ii. 11; Bell, Com. ii. 134, 407; More, Notes to Stair, 423; Graham Stewart, Diligence, 525; Goudy, Bankruptcy, 4th ed., 528; Juridical Styles, 3rd ed., iii. 269. For a history of inhibitions, Ross, Lectures, iii. 459.

[1] Ersk. ii. 11, 2. [2] Bell, Com. ii. 136. [3] *Clarke* v. *M'Nab*, 1888, 15 R. 569.

and unobjectionable. If it proceeds on a decree, it may be either a decree of the Court of Session or of the ordinary Sheriff Court, but not a decree under the Small Debt Acts.[1] If it proceeds on a bond, bill, or constituted debt of that class, it is not necessary that the document be recorded for preservation and execution. There must, however, be a document of debt, and a debt standing merely on an open account would not be a sufficient warrant for letters of inhibition. Where the obligation is for a sum of money the amount must be specific, so that creditors and purchasers may know the extent of the burden. It is not necessary, however, that the obligation should be of a pecuniary character, *e.g.* in the case of the *Seaforth Trs.*,[2] the inhibition was raised on the dependence of an action to enforce implement of an agreement to grant a lease. In this case the inhibition was used upon the dependence, but it is thought that inhibition on the agreement itself would be competent.[3]

Subsection (2).—*Inhibition in Security.*

415. Inhibition in security may proceed (i) on a document of debt where the term of payment is future or contingent, or (ii) on the dependence of an action.

(i) *On a Future or Contingent Debt.*

416. On the principle that diligence is not in general competent for a future or contingent debt, inhibition, like arrestment, cannot proceed upon such debts unless the bill contains an averment that the debtor is *vergens ad inopiam* or *in meditatione fugæ*.[4] If there is an averment to this effect, however, letters of inhibition will be issued without inquiry, and any questions raised by the debtor as to whether the averment is warranted will be discussed in a petition for recall. In each case it will be a question of circumstances, and in considering this question "the words *vergens ad inopiam* are used in a somewhat loose and popular sense, and must be so used if the diligence of inhibition is to be preserved in its efficiency." [5]

(ii) *On the Dependence of an Action.*

417. Inhibition may proceed on the dependence of a summons as soon as it has been signeted and at any time up to the final decision in the House of Lords. The action founded on must contain pecuniary conclusions other than a conclusion for expenses.[6] Inhibition is not competent on an action of declarator or reduction alone, or on a con-

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[1] *Lamont*, 1867, 6 M. 84.

[2] *Seaforth Trs.* v. *Macaulay*, 1844, 7 D. 180.

[3] Juridical Styles, iii. 275–6.

[4] *Anderson* v. *Anderson*, 1848, 11 D. 118 ; *Dove* v. *Henderson*, 1865, 3 M. 339 ; *Symington* v. *Symington*, 1875, 3 R. 205.

[5] *Campbell* v. *Cullen*, 1848, 10 D. 1496, per Lord Jeffrey at p. 1498

[6] *Weir* v. *Otto*, 1870, 8 M. 1070 ; *Stafford* v. *M'Laurin*, 1875, 3 R. 148.

sistorial action without pecuniary conclusions,[1] but it is competent on an action of separation and aliment.[2] The dependence of an action against a firm has been held to found inhibition, otherwise competent, against the heritable estate of an individual partner.[3] The effect of inhibition on the dependence depends entirely on decree being obtained in the action, and if the action fails the inhibition has no effect.

418. The expenses of using inhibition on the dependence of an action are held not to form part of the expenses of process, and are never awarded as a part of these.[4] The principle is that " the using of diligence on the dependence, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action." [5] Even consistorial causes, in which a husband is liable for his wife's expenses, are not excepted from this rule.[6]

Section 3.—Procedure in obtaining Inhibition.

Subsection (1).—*Warrant.*

419. The warrants upon which inhibition proceeds are (i) letters of inhibition, or (ii) a summons passing the signet containing warrant to inhibit.

(i) *Letters of Inhibition.*

420. In order to obtain letters of inhibition the creditor presents his document of debt in the Bill Chamber along with a bill, which is a short petition craving warrant for the signeting of the letters of inhibition. The bill must set forth fully and explicitly all the grounds that justify the application for inhibition.[7] The bill is generally passed at once, and the Bill Chamber Clerk writes "*fiat ut petitur*" upon the bill, which is then a warrant for letters of inhibition, and returns the whole documents. In cases of difficulty the Clerk of the Bill Chamber may report to the Lord Ordinary on the Bills, whose subscription will then be necessary.[8] Under exceptional circumstances the Lord Ordinary may also report the matter to the Court.[9] The old form of letters is still competent, but in practice has been superseded by the abbreviated form provided by statute.[10] The letters in this form are addressed to messengers-at-arms, and after setting forth the document on which the creditor founds, charge them to inhibit the debtor "from selling, disponing, conveying, burdening, or otherwise affecting his lands or

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[1] *Ketchen* v. *Grant*, 1871, 9 M. 966.

[2] *Thomson* v. *Sharp*, 1828, 7 S. 1; cp. *Gordon* v. *Duncan*, 1827, 5 S. 544 (N.E. 511); *Burns* v. *Burns*, 1879, 7 R. 355.

[3] *Ewing & Co.* v. *M'Clelland*, 1860, 22 D. 1347.

[4] *Taylor* v. *Taylors*, 25th January 1820, F.C.

[5] *Symington* v. *Symington*, 1874, 1 R. 1006, per Lord Pres. Inglis at p. 1007; *Black* v. *Jehangeer Framjee & Co.*, 1887, 14 R. 678.

[6] *Symington, supra.*

[7] *Stevens* v. *Campbell*, 1873, 11 M. 772.

[8] 53 Geo. III, c. 64, s. 17.

[9] *Lamont*, 1867, 6 M. 84.

[10] 31 & 32 Vict. c. 101, s. 156, Sched. QQ.

heritages to the prejudice of the complainer." The letters, as they pass the Signet, must be signed by a Writer to the Signet. After the fiat is written on the bill, the letters are presented along with the bill at the Signet Office, where the letters are signeted and the bill is retained.

(ii) *Warrant in Summons.*

421. By the Court of Session Act, 1868, a warrant to inhibit inserted in the will of a summons passing the Signet has the same force and effect as letters.[1] This warrant passes the Signet without production of any ground of debt, the summons itself being the ground for the warrant, and no separate letters are required. This procedure has now to a great extent superseded the procedure by bill and letters.

SUBSECTION (2).—*Execution.*

422. As inhibition contains a double prohibition, one against the debtor, and another against the public, it requires double execution, namely, service and registration.

(i) *Service.*

423. The execution against the debtor is made by delivering a copy to the debtor personally or at his dwelling-place, or if he is furth of Scotland edictally. The mere service of a summons is not held to include the warrant of inhibition contained therein. The inhibition must be specially mentioned and a separate execution should be returned.

(ii) *Registration.*

424. Prior to 1868 two steps were necessary in order to execute the inhibition against the public, namely, publication to the lieges at the market cross, and registration within forty days in the General or Particular Register of Inhibitions. The Land Registers Act of 1868 abolished the Particular Registers of Inhibitions, and provided that if inhibitions were recorded in the General Register of Inhibitions no further publication should be necessary.[2] Thus the ceremony of publication to the lieges has now disappeared, and registration is held to bring the inhibition sufficiently to the notice of the public. The General Register of Inhibitions is now combined with the Register of Adjudications, the combined register being known as the Register of Inhibitions and Adjudications.[3] When letters of inhibition are used, the letters themselves with the execution thereof must be registered, and when the warrant of inhibition is contained in a summons, the summons itself including the warrant of inhibition and the execution of the warrant must be registered, but not the condescendence or pleas-in-law.[4]

425. Formerly, provided inhibitions were registered within forty days from the date of publication at the market cross, they took effect

[1] 31 & 32 Vict. c. 100, s. 18, where a form is given.
[2] 31 & 32 Vict. c. 64, s. 16.
[3] 14 & 15 Geo. V. c. 27, s. 44.
[4] 31 & 32 Vict. c. 100, s. 18.

from the date of publication. Thus a search in the Register of Inhibitions failed to cover the period of forty days which might intervene between publication and registration, and it was necessary to make a search at the Signet Office in order to ascertain whether there had been any inhibitions within this period. This defect was remedied by the Titles to Land Consolidation Act, 1868, which provides that if a short Notice of Inhibition is registered in the Register of Inhibitions, the inhibition shall take effect from the date of the registration of the notice, provided the inhibition itself and the execution thereof are duly registered not later than twenty-one days from that date.[1] Such registration is not, however, equivalent to a notarial intimation under the Act of Sederunt, 19th February 1680.[2] Where inhibition is used on the dependence, it is suspended during the process, but the effect draws back to the date of registration on decree being obtained.

Subsection (3).—*Vitiations.*

426. As in the case of other forms of diligence, vitiations and material erasures in the letters, executions, or service copies are fatal to inhibitions. Thus, a misdescription in the service copy of one of several documents on which the inhibition proceeded was held sufficient to render the diligence ineffectual so far as founded on the debt contained in that document.[3] An error in stating the amount of the debt in the record is equally fatal.[4] Where the debtor was furth of Scotland, the fact that the words "office of Edictal Citations" in the warrant were written on an erasure, was held to nullify the inhibition.[5] An error, such as a mistake in the debtor's Christian name in the letters, produces the same result.[6] The omission in the entry in the minute-book of the names of two out of three debtors against whom the inhibition was to be used, rendered the diligence ineffectual *quoad* the two omitted.[7]

Section 4.—Subjects affected by Inhibition.

427. In their old form letters of inhibition were directed against the debtor's whole estate both heritable and moveable. With the growth of commerce, however, this became an impossible restriction upon trade, and it has now long been settled that only heritage is affected,[8] and in the modern statutory form the inhibition is directed only against the debtor's "lands or heritages."[9] All heritable subjects are affected by

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[1] 31 & 32 Vict. c. 101, s. 155, Sched. PP.

[2] *Mackintosh's Trs.* v. *Davidson & Garden*, 1898, 25 R. 554, see para. 429, *infra.*

[3] *Burleigh* v. *Fearn*, 1848, 10 D. 1517.

[4] *Cooke* v. *Falconer's Reps.*, 1850, 13 D. 157; *Malcolm* v. *Northern Reversion Co.*, 1846, 8 D. 1201, affd. 1849, 6 Bell's App. 359.

[5] *Burleigh* v. *Horwood*, 1848, 10 D. 1512.

[6] *Walker* v. *Hunter*, 1853, 16 D. 226.

[7] *Park* v. *Wood's Trs.*, 1838, 16 S. 1363.

[8] *Braco* v. *Ogilvy*, 1623, Mor. 7016; Stair, iv. 50, 5.

[9] 31 & 32 Vict. c. 100, s. 18; c. 101, s. 156, Sched. QQ.

an inhibition, and it is not necessary that the right of the persons inhibited should be completed by infeftment.[1] Thus a search in the Register of Inhibitions and Adjudications will be required even against those who have an unfeudalised title. An exception to the general rule that infeftment is immaterial is to be found in the case of heritable bonds. A heritable bond on which no infeftment has followed is probably not affected by an inhibition, although there has been some difference of opinion as to this question.[2] Prior to 1868 inhibition covered not only heritable property belonging to the debtor at the date of the execution of the inhibition, but also affected *acquirenda*, or heritable property subsequently acquired, thus adding very much to the length of the searches required. This was altered by the Consolidation Act of 1868, and inhibition does not now affect lands acquired after its date or after the date of the previous notice, unless such lands were at that date destined to the debtor "by a deed of entail or by a similar indefeasible title." [3]

428. Inhibition bears no reference to any special estate, but is strictly personal to the debtor inhibited, and an heir is not restrained from alienation by diligence used against his ancestor.[4]

429. An inhibited creditor holding a bond and disposition in security is not debarred from taking payment of his debt and granting a discharge, as the discharge is not a voluntary deed, but one which the creditor could be compelled to grant. Similarly, as a creditor is bound at request of his debtor to assign the bond on payment of the money due to him, such an assignation would not be struck at by an inhibition. It was to meet this difficulty that the Court provided by Act of Sederunt, 19th February 1680, that if notarial intimation of the inhibition has been made by the inhibitor to the debtor, he can only make payment in an action to which the inhibitor is also cited. In practice no search is required against heritable creditors, unless they have sold the subjects under their power of sale. The right of a disponer who has executed a conveyance *ex facie* absolute, but really in security, and on which infeftment has followed, may be affected.[1] There is some doubt as to whether an inhibition against the granter of an *ex facie* absolute disposition, even if intimated to the disponee, will effectually prevent the latter from claiming a preference for subsequent advances as against the inhibitor. Graham Stewart is of the opinion that the disponee is not entitled after intimation of the inhibition to him to make further advances.[5]

430. Inhibition does not attach arrears of rents or interest, as these are moveable.[6]

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[1] *Dryburgh* v. *Gordon*, 1896, 24 R. 1.
[2] Graham Stewart on Diligence, pp. 548–9, and authorities there cited.
[3] 31 & 32 Vict. c. 101, s. 157.
[4] *Roberts* v. *Potter and Reid*, 1829, 7 S. 611; *Menzies* v. *Murdoch*, 1841, 4 D. 257.
[5] Graham Stewart on Diligence, p. 565.
[6] *Scot* v. *Coutts*, 1750, Mor. 6988.

Section 5.—Effects of Inhibition.

Subsection (1).—*Effects Negative and Prohibitory.*

431. Inhibition, which is ordinarily called a real diligence, is, in fact, merely negative and prohibitory in its effects. The debt founded on remains personal, and inhibition, unless followed up by adjudication, gives the creditor no real right and no active title to enforce payment out of the estate affected. It, however, strikes at all voluntary deeds, whether onerous or gratuitous, posterior to its date and affecting the debtor's heritable property, and at all diligence, as by adjudication, against such property founded on debts contracted subsequently to its date.

Subsection (2).—*Necessary Deeds not affected.*

432. Necessary deeds, *i.e.* those which the debtor was under an antecedent obligation to grant, are not affected, because these could have been enforced before the inhibition was raised. Such are, *e.g.*, a conveyance of lands in implement of a binding minute of sale, or heritable security for debt granted in fulfilment of a prior personal obligation to do so.[1] It is otherwise in the case of a heritable bond granted in security of a prior debt where there is no such obligation.[2] Nor does inhibition destroy the effect of a cash-credit heritable bond, recorded prior to it, as security for advances made subsequently.[3] Adjudications on anterior debts, not being voluntary on the part of the debtor, are not struck at. And it has been held that where the titles of the debtor's lands were deposited with his law agent after inhibition, the agent acquired a security which might, in the event of a sale of the estates, entitle him to a preference over the inhibiting creditor on the price, for his business accounts incurred even after the inhibition.[4]

Subsection (3).—*Ordinary Administration not interrupted.*

433. Ordinary administration of the debtor's property is not interrupted by inhibition. He is not barred by it from uplifting and discharging the rents, or the interest of heritable debts.[5] He may grant leases for an adequate rent and of ordinary duration. It is otherwise where the lease is a mere "attempt to obtain, in the form of a lease, a security for debt which the creditors could not have obtained directly by the voluntary act of the debtor or by legal diligence."[6] Thus a lease was set aside which had been granted in consideration of a sum in name of grassum and a certain rent, the tenant being allowed to retain the whole rent for his repayment.[7] Similarly, inhibition was held to strike

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[1] *Livingstone* v. *M'Farlane*, 1842, 5 D. 1; Stair, iv. 50, 18, 19; Ersk. ii. 11, 11.
[2] *Strachan* v. *Town of Aberdeen*, 1708, Mor. 2609, 7037.
[3] *Campbells' Tr.* v. *De Lisle's Exrs.*, 1870, 9 M. 252.
[4] *Menzies* v. *Murdoch*, 1841, 4 D. 257.
[5] *Scot* v. *Coutts*, 1750, Mor. 6988.
[6] *Wedgwood* v. *Catto*, 13th November 1817, F.C.
[7] *Wedgwood, supra*; *Gordon* v. *Milne*, 1780, Mor. 7008.

at a lease for fifty-seven years, for a rent clearly inadequate, and giving the tenant unusual powers of cutting and disposing of wood.[1]

Subsection (4).—*Inhibitor's Right of Reduction.*

434. Subsequent voluntary deeds, and diligence on subsequent debts, affecting the heritable estate of the person inhibited, are not rendered void *ipso facto* by the inhibition. They are, however, reducible by the inhibitor in so far as he is prejudiced by them. They are reducible only to that extent, since the inhibition rests solely on the inhibitor's interest. A decree of reduction *ex capite inhibitionis* is, in effect, equivalent to a declarator that, notwithstanding the posterior alienation or burden, the inhibitor is entitled to affect the lands as if such alienation or burden had never been granted. The reduction does not interfere with the relations of other creditors *inter se*, and after the inhibitor has secured what he would have received from the debtor's estate if the act inhibited had never occurred the burden or alienation is fully effectual, and in a question with the other creditors is not affected by the reduction. For this reason, where there are prior debts preferable to his own, sufficient in amount altogether to exclude the creditor inhibiting, posterior debts are not reducible by him *ex capite inhibitionis*.[2]

435. This right of reduction gives the inhibitor indirectly this important practical advantage, that a purchaser of the subjects covered by the inhibition is entitled before paying the price to have the inhibition discharged by payment of the inhibitor's debt.[3] It affords a ground for suspending a charge to pay the price. And where a voluntary sale has taken place *spreta inhibitione*, the inhibitor acquires indirectly a preference on the price, since he can at any time reduce the sale so far as he is prejudiced by it and can proceed to adjudge, while no other creditor can effectually adjudge after the sale has been completed. This exclusive right gives him, even without actual reduction and adjudication, a preference on the price in a question with other creditors using arrestment, for example, after the sale.[4]

Subsection (5).—*Principles of Ranking.*

436. The inhibitor has, however, no real right, and is not entitled merely by his inhibition to rank on the estate in competition with other creditors whose right is real. This fact, combined with the inhibitor's right to reduce posterior deeds and diligence founded on posterior debts, but to reduce them only so far as they are hurtful to him, causes considerable disturbance in the application of the ordinary

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[1] *Earl of Breadalbane* v. *M'Lauchlan*, 1802, Hume 242; Bell, Com. ii. 142; More, Notes to Stair, 425.

[2] Ersk. ii. 11, 16.

[3] *Horne* v. *Kay*, 1824, 3 S. 81 (N.E. 54).

[4] *Monro of Pointzfield* v. *Gordon's Crs.*, 1777, Mor. "Inhibition," App. 1; *M'Lure* v. *Baird*, 1807, Mor. "Competition," App. 3.

rules of ranking in the distribution of the debtor's estate. Many difficult questions may arise, of which only an illustration rather than a full statement can here be given. The subject is elaborately discussed by Bell[1] in a passage in which are set forth his five well-known "Canons of Ranking." The rules as stated by him have been judicially approved,[2] and are well established. The general principle in all cases is that the inhibitor is to be neither prejudiced nor benefited by the right at which his diligence strikes. He is to draw from the distribution simply the amount which he would have drawn if such right had never been granted, but without disturbing the ranking of other creditors *inter se*. "The holder of the excluding right shall have the full benefit of his preference against those on whom it legally operates, and this preference shall not, on the one hand, be suffered to affect creditors not legally subject to its influence, nor, on the other, to give advantage to those who have no right to take benefit under it." [3]

SUBSECTION (6).—*Ranking of Inhibitor and Heritable Creditors.*

437. Thus in a question simply with the holders of voluntary heritable securities, the ordinary rule of *prior tempore potior jure* applies, and the preference is determined solely by the dates of their respective securities. Prior securities are not affected by the inhibition at all.[4] As regards the holders of posterior securities, the inhibitor, though he is not entitled to rank with them, since his debt is still personal, nevertheless draws back from them in the ranking the amount which he would have received if their securities had never been granted. If the holders of these posterior securities rank *pari passu inter se*, the burden of the inhibitor's debt falls proportionately upon them all. If there is a preference among them, it falls ultimately upon the creditor who ranks lowest.[5]

SUBSECTION (7).—*Ranking of Inhibitor and Adjudgers.*

438. Adjudication led by one or more personal creditors makes the question more complicated. Adjudication is not a voluntary act of the debtor, and, so far as founded on prior debts, is not affected by the inhibition. Accordingly, the creditor inhibiting is postponed to creditors adjudging on such debts, and if the estate is insufficient to satisfy their claims he is entirely excluded. He acquires a preference only from the date at which he makes his right real by adjudging. All adjudications led within year and day of that first made effectual, and all before it, rank *pari passu*,[6] and, subject to this rule, the inhibitor

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[1] Com. ii. 139, 407 *et seq.*

[2] *Baird & Brown* v. *Stirrat's Tr.*, 1872, 10 M. 414, at p. 416.

[3] Bell, Com. ii. 407 ; *Cockburn's Crs.*, 1709, Mor. 2877.

[4] *Campbell's Tr.* v. *De Lisle's Exrs.*, 1870, 9 M. 252.

[5] *Lithgow* v. *Creditors of Whitehaugh*, 1747, Mor. 6974 ; *Creditors of Langton*, 1760, Mor. 6995.

[6] Act 1661, c. 62.

may by adjudging rank *pari passu* with the creditors adjudging on prior debts, while he has a preference over those adjudging on posterior debts. He may even, by adjudication, wholly exclude prior personal creditors who have failed to lead adjudication within year and day of his. The principle is applied by allocating, in the first instance, a proportional dividend to all whose rights rank *pari passu*. Effect is then given to the exclusive right created by the inhibition by allowing the inhibitor to draw back, from the posterior creditors at whose right his inhibition strikes, the difference between the sum actually allotted to him and that which he would have received in the ranking had the posterior debts never existed. "The inhibitor's preference must be secured to him entirely at the expense of the subsequent creditors, while creditors whose debts were contracted prior to the inhibition draw just what they would have done had the whole creditors been ranked *pari passu*." [1] Where there are more than one inhibition, and all of them are followed by adjudication, the inhibitors are preferable, not according to the dates of the inhibitions, but according to the adjudications, and therefore *pari passu* if they adjudge within year and day of each other.

Subsection (8).—*Ranking of Inhibitor, Adjudgers, and Heritable Creditors.*

439. A heritable security may have been granted which is struck at by the inhibition, but is preferable to adjudication on prior debts. Here the same principles as before are applied. The heritable creditor's claim is satisfied *primo loco*. The adjudgers, including the inhibitor if he has adjudged, draw a *pari passu* dividend. The inhibitor then draws back from the holder of the heritable security the sum which he would have received in addition to that already allotted to him if the heritable security had never been granted.[2]

Subsection (9).—*Ranking of Inhibitor in Sequestration.*

440. The same rules apply where the debtor is sequestrated. By the Bankruptcy (Scotland) Act, 1913,[3] the whole heritable estate of the bankrupt vests in the trustee in the sequestration, subject to existing preferable securities. The Act provides that the right of the trustee shall not be challengeable on the ground of any prior inhibition, but the preference to which such inhibition may be entitled in the ranking is expressly saved. The effect of this provision is that while the trustee may realise the debtor's heritable estate, he must recognise the inhibiting creditor's preference in the distribution of the price.[4]

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[1] *Baird & Brown* v. *Stirrat's Tr.*, 1872, 10 M. 414, per Lord Pres. Inglis at p. 419.

[2] *Campbell* v. *Gordon*, 1841, 3 D. 629; revd. 1842, 1 Bell's App. 563. For a practical application of these principles, see the report by Mr. James Webster, S.S.C., printed in the Session Papers of this case.

[3] 3 & 4 Geo. V. c. 20, s. 97.

[4] *Ewing & Co.* v. *M'Clelland*, 1860, 22 D. 1347; *Baird & Brown, supra.*

Section 6.—Extinction of Inhibition.

Subsection (1).—*Discharge.*

441. An inhibition is "purged" by payment of the debt on which it is founded. The proper discharge is a probative deed granted by the inhibitor.[1] This is recorded in the Register of Inhibitions and Adjudications; or it may be recorded in the Register of Deeds, and on extract of it being produced at the Register of Inhibitions and Adjudications the inhibition is marked as discharged on the margin of the minute-book. Any creditor whose debt is struck at by the inhibition may pay the inhibitor's claim, and become thereby entitled to an assignation of the debt and diligence against the inhibited debtor.

Subsection (2).—*Recall.*

442. The threatened use of inhibition, if malicious and oppressive, may be prevented by interdict.[2] The Court used formerly to interpose in certain cases, sometimes even *ex proprio motu*, to prevent the issue or the registration of letters. The usual practice now is to allow the inhibition to pass, and, where proper, to recall it afterwards. To obtain recall or restriction of inhibition, the appropriate procedure is by petition. An action of declarator that an inhibition had fallen by lapse of time has been dismissed as incompetent.[3] At common law such a petition was competent only in the Inner House, as being addressed to the *nobile officium* of the Court. The Court refused even to remit to the Lord Ordinary on the Bills in vacation,[4] but it would probably not refuse to do so now. By statute a petition for the recall of inhibition on a depending summons may be presented to the Lord Ordinary before whom the case is enrolled, or, in vacation, to the Lord Ordinary on the Bills. The Lord Ordinary may order answers, and may recall or restrict the inhibition, with or without caution; and his judgment is subject to review by reclaiming note, which must be presented within ten days.[5] It has been held that a minute may be lodged, without a separate petition, and the recall or restriction granted thereafter on the motion of the defender.[6] In practice, recall of inhibition used in an action enrolled in the Outer House is granted by simple motion.[7] The Inner House is still the proper tribunal where there is no depending process, or where the process is already before the Court on a reclaiming note.

443. The inhibition will be recalled if nimious or oppressive, or if it has been otherwise improperly used.[8] Recall is not granted where the

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[1] Juridical Styles, 5th ed., ii. 744.
[2] *Beattie & Son* v. *Pratt*, 1880, 7 R. 1171.
[3] *Baring Bros. & Co.* v. *Wight*, 1824, 2 S. 727 (N.E. 609).
[4] *Greig*, 1866, 4 M. 1103.
[5] 31 & 32 Vict. c. 101, s. 158.
[6] *Barbour's Trs.* v. *Davidsons*, 1878, 15 S.L.R. 438.
[7] Maclaren, Court of Session Practice, p. 903.
[8] *Ketchen* v. *Grant*, 1871, 9 M. 966; *Stevens* v. *Campbell*, 1873, 11 M. 772; *Symington* v. *Symington*, 1875, 3 R. 205.

debt is immediately exigible and proved by a liquid document,[1] nor usually where the debtor is *vergens ad inopiam*. When it is granted, caution is usually decerned for as a condition, the amount of caution depending on the circumstances of the case.[2] The Keeper of the Register of Inhibitions and Adjudications is authorised by the decree to mark the inhibition as discharged or restricted, and this is done by him on the margin of the record on the extract decree being produced.

444. The expenses are in the discretion of the Court. If the inhibition has been recalled as nimious or oppressive the petitioner for recall will be found entitled to his expenses from the inhibitor,[3] even though the latter succeeds on the merits.[4] If, however, the inhibition was warranted and is only recalled on caution, the expenses of recall will fall upon the petitioner. When the grounds for the inhibition have disappeared owing to all questions between the parties having been settled, the inhibitor is bound to withdraw his diligence extra-judicially, otherwise he will be found liable in the expenses of the petition for recall.[5] When recall is granted by the Lord Ordinary, the expenses, unless reserved, must be obtained at that time. It has been held that where inhibition was recalled and extract allowed without disposing of or reserving the question of expenses, it was incompetent to obtain expenses subsequently by a motion either in the petition for recall or in the original action.[6]

Subsection (3).—*Prescription.*

445. Inhibitions, when duly registered, were at common law subject only to the long negative prescription.[7] By the Conveyancing Act, 1874, it was provided that inhibitions should prescribe in five years from the date at which they take effect, but that the inhibition might be renewed for successive periods of five years by recording a statutory memo provided by the Act.[8] But by the Conveyancing (Scotland) Act, 1924, it was provided that inhibitions should no longer be renewable to the effect of keeping the old inhibition in life, but should prescribe absolutely on the lapse of five years.[9] In dealing with modern titles, therefore, a search in the Register of Inhibitions and Adjudications for five years

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[1] *Royal Bank of Scotland* v. *Bank of Scotland*, 1729, 1 Pat. 14.

[2] *Robertson* v. *Buntine*, 1800, Hume 242; *Gordon* v. *Duncan*, 1827, 5 S. 544 (N.E. 511); *Herbertson* v. *Baxter*, 1830, 8 S. 564; *Cox* v. *Urquhart*, 1830, 8 S. 599; *Dove* v. *Henderson*, 1865, 3 M. 339; *Burns* v. *Burns*, 1879, 7 R. 355; *James* v. *James*, 1886, 13 R. 1153; *Johnstone, Petr.*, 1897, 4 S.L.T. 216.

[3] *Pedie* v. *Stewart*, 1830, 8 S. 710; *Hamilton* v. *Bruce's Trs.*, 1857, 19 D. 745; *Cullen* v. *Buchanan*, 1862, 24 D. 1280; *Mackintosh* v. *Miller*, 1864, 2 M. 452; *Radford & Bright, Ltd.* v. *D. M. Stevenson & Co.*, 1904, 6 F. 429.

[4] *Clark* v. *Loos*, 1855, 17 D. 306, per Lord Justice-Clerk Hope at p. 307.

[5] *Milne* v. *E. & J. Birrell*, 1902, 4 F. 879, following *Robertson* v. *Park, Dobson & Co.*, 1896, 24 R. 30.

[6] *Dobbie* v. *Duncanson*, 1872, 10 M. 810.

[7] Stair, iv. 50, 23.

[8] 37 & 38 Vict. c. 94, s. 42, Sched. J.

[9] 14 & 15 Geo. V. c. 27, s. 44, (3) (*a*).

back from the date of the search against all who have been proprietors during that period would be sufficient to disclose any inhibitions affecting the title, although a more extensive search in this Register may be necessary in order to disclose other personal diligences.

INHIBITION OF WIFE.

See HUSBAND AND WIFE.

INITIALS.

See DEEDS (EXECUTION OF).

INJURY.

See DAMAGES; NEGLIGENCE; REPARATION.

INNER HOUSE.

See COURT OF SESSION.

INNKEEPERS.

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Section 1.—Introductory.

446. The law relating to innkeepers has its origin, in Scotland, in a series of Acts of the Scottish Parliament, which were passed in the fifteenth century.[1] In this respect it differs from the law of England, which is based upon the common law, or, as it is termed in this particular branch, "the custom of England."[2] Although there exists this distinction in regard to source, and though, also, there are few decisions of the Scottish Courts, the Scots law is substantially the same as that of England;[3] and the term employed there, "common inn," appears to be identical with the Scots term, "hotel."

Section 2.—Definition.

447. An innkeeper is one who invites all the public to come to his house, where, for reasonable remuneration, he offers them board and lodging.

Section 3.—Right of Traveller to Accommodation.

448. When a person thus holds himself out as an innkeeper, certain rights and duties arise as between him and the public. "He is the servant of the public, and bound to receive every decently behaved member of the public, unless his house is full; and if he does not,

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[1] Act 1424, c. 25; Act 1425, c. 11; Act 1427, c. 3; and also an Act of the sixteenth century (Act 1535, c. 23) which reaffirmed the provisions of these statutes.

[2] *Lamond* v. *Richard*, [1897] 1 Q.B. 541, per Esher M.R. at p. 545, and Chitty L.J. at p. 547.

[3] *Rothfield* v. *North British Rly. Co.*, 1920 S.C. 805, per Lord Justice-Clerk (Scott Dickson) at pp. 825, 826.

he is liable in an action of damages." [1] Prior to the case of *Rothfield* [2] there was no express decision on the point in Scotland, but this statement by Lord President Inglis was generally accepted as law.[2] But the right of a traveller to board and lodging is not absolute. An innkeeper may refuse to take in a guest, either (*a*) because he never has possessed, or has ceased to possess, the qualification of being a traveller, or (*b*) on account of some objection personal to the particular guest which justifies the innkeeper in refusing him.

449. The first of these limitations of the traveller's right was clearly stated by Wright J. in *Lamond's* case: [3] "Then Denman J. says, 'the principles laid down in *Burgess* v. *Clements* shew that the object of the law upon the subject of an innkeeper's liability is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging.' That obviously is the principle on which the liability rests, and it is clear, I think, that the obligation exists only so long as the person is a traveller, and exists towards him only in so far as he is a traveller." Accordingly in *Lamond's* case it was held that, since the plaintiff was no longer residing in the hotel as a traveller, the defendant was entitled to give her notice to leave.

If all the bedrooms of an inn are full, an innkeeper is not bound to provide a traveller with shelter and accommodation for the night, although the coffee room is unoccupied, and the traveller demands to be allowed to pass the night there.[4]

450. An innkeeper is not bound to receive any individual traveller, where there is a good personal objection in his case. He may not "refuse guests capriciously or maliciously. But every hotel-keeper must have a certain power of selecting, or, perhaps, to speak more precisely, of rejecting certain guests. He is bound to attend to the decency and order of his establishment." [5] It was held, therefore, in *Rothfield's* case [2] that the proprietors of an hotel were justified in refusing to continue to receive and accommodate a guest in their hotel, if his presence was undesirable and objectionable to the other guests, and his conduct prejudicial to the interests and proper conduct of the hotel. In that case the defenders, who were the proprietors of the hotel, contended that their hotel stood in a class by itself and was not subject to the ordinary law affecting inns. That view receives tentative support both from the judgment of Esher M.R. in *Lamond's* case [6] and from the observations of Lord President Inglis in *Strathearn Hydropathic Company*,[7] but the Court held that the large station hotel, which figured in this case, was on the same footing as any other hotel, so far as its obligations to travellers were concerned.[8]

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[1] *Ewing* v. *Campbells*, 5 R. 230, per Lord Pres. Inglis at p. 234; and cp. *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11, per Esher M.R. at pp. 19 and 20.

[2] *Rothfield* v. *North British Rly. Co.*, 1920 S.C. 805, per Lord Justice-Clerk (Scott Dickson) at pp. 825, 826. [3] [1897] 1 Q.B. at p. 543. [4] *Browne* v. *Brandt*, [1902] 1 K.B. 696.

[5] *Strathearn Hydropathic Co.* v. *Inland Revenue*, 1881, 8 R. 798, per Lord Pres. Inglis at p. 800. [6] [1897] 1 Q.B. 541, at p. 545. [7] 8 R. 798, at p. 801.

[8] 1920 S.C. per Lord Ormidale at p. 836.

451. The obligation which rests upon innkeepers to supply food and shelter to travellers includes an obligation to supply drink,[1] but it does not give the general public a right to demand drink at the drinking bar of an hotel.[2]

452. An innkeeper is bound to take in not only the traveller, but also his luggage; and luggage is not confined to personal luggage, but extends to whatever the traveller may bring with him, provided it is not exceptional or dangerous, such as a piano, or a tiger, or dynamite.[3]

Section 4.—Responsibility for Property of Guests.

Subsection (1).—*The Edict* Nautæ, Caupones, Stabularii.

453. Under the Edict *Nautæ, Caupones, Stabularii* the innkeeper is responsible for the absolute safety of the property of his guests while they are in the inn. This provision was added to the Roman code in order to protect travellers from the danger of collusion between innkeepers and thieves, and has been incorporated in the codes of most modern states. A similar rule holds good in England, where it is usual to explain it as derived from the custom of the realm. But it cannot be doubted that that custom was founded upon the Roman law.[4] The Edict [5] requires the innkeeper to restore all goods placed in his charge in the same condition as that in which he received them, except in the case where they have been lost or destroyed by the act of God or of the King's enemies, and it applies to keepers of livery stables as well as to innkeepers who stable the horses of guests at their inns.[6]

Subsection (2).—*Exceptions to Liability under Edict.*

(i) *Act of God.*

454. The term "act of God" has been thus defined: "The 'act of God' is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." [7] In Scotland fire is considered an act of God, or inevitable accident, for which the innkeeper is not responsible,[8] but that is not so in England.[9]

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[1] *Oliver* v. *Loudon*, 1896, 23 R. (J.) 34.

[2] *The Queen* v. *Rymer*, 1877, 2 Q.B.D. 136.

[3] *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 501, per Esher M.R. at p. 504.

[4] *Nugent* v. *Smith*, 1875, 1 C.P.D. 19, per Esher M.R. at pp. 28, 29, where he refers to the treatise of Mr Justice Story on Bailments and the judgment of Lord Holt in *Coggs* v. *Bernard*, 2 Lord Raym. 909.

[5] The text is as follows : *Ait prætor : nautæ, caupones, stabularii, quod cuiusque salvum fore receperint, nisi restituent, in eos iudicium dabo* (Digest, 4, 9, 1 pr.).

[6] *Mustard* v. *Paterson*, 1923 S.C. 142.

[7] *Nugent* v. *Smith*, 1876, 1 C.P.D. 423, per James L.J. at p. 444.

[8] *M'Donell* v. *Ettles*, 15th December 1809, F.C.

[9] *Forward* v. *Pittard*, 1785, 1 T.R. 27; 1 Bell, Ill. 170.

(ii) *Negligence of Guest.*

455. An innkeeper also escapes liability if he can shew that the guest himself has been negligent. The degree of negligence which will relieve an innkeeper is a question for a jury, but the statement of the law by Erle J. in *Cashill's* case [1] has been frequently adopted: "The innkeeper is liable for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may reasonably be expected to have taken under the circumstances." Not locking the bedroom door before going to sleep has been held such negligence.[2]

Subsection (3).—*Innkeepers' Liability Act*, 1863.

456. The Innkeepers' Liability Act, 1863,[3] in no way altered the rights and obligations that exist as between innkeeper and guest, but it restricted in certain cases the amount for which the innkeeper may be made liable. It provides that an innkeeper shall not be liable to make good to any guest any loss of or injury to goods or property brought to his inn, not being a horse or other live animal or any gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the case where such goods or property has been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or a servant in his employment; or where the goods have been deposited expressly for safe custody with the innkeeper.[4] If an innkeeper refuses to receive such goods for safe custody, or makes it impossible for the guest to deposit them, or fails to keep a notice containing the terms of s. 1 exhibited conspicuously in the entrance hall of his inn, he forfeits the benefit of the provisions of the Act.[5]

457. The onus of proving that the loss occurred owing to the neglect or default of the innkeeper rests upon the person seeking to recover, and he must shew that it was due to that default alone: if he himself contributed to the loss by his own negligence, he cannot recover more than £30.[6] The meaning of the phrase "deposited expressly for safe custody" with the innkeeper was considered in *Whitehouse* v. *Pickett*,[7] and it was held in that case that it was not sufficient merely to leave in the office a bag containing valuables, without warning the innkeeper. "Under the statute innkeepers are liable beyond £30, if property has been deposited with them expressly for safe custody. The word 'expressly' is not used without a purpose. It means that an intention by the bailor is not enough. That intention must be brought to the mind of the bailee or his agent in some reasonable and intelligent manner,

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[1] *Cashill* v. *Wright*, 1856, 6 El. & Bl., 891.
[2] *Oppenheim* v. *White Lion Hotel Co.*, 1871, L.R. 6 C.P. 515.
[3] 26 & 27 Vict. c. 41. [4] *Ibid.*, s. 1. [5] *Ibid.*, ss. 2 and 3.
[6] *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11, per Esher M.R. at p. 23.
[7] 1908 S.C. (H.L.) 31.

so that he may, if so minded, insist on the precautions specified in the Act." [1]

Section 5.—Innkeeper's Lien.

458. As a counterpart to the innkeeper's obligation to receive any traveller and his goods, he has a right of retention or lien over the goods, horses, carriages, and (presumably) motor-cars [2] of the traveller for the expense of keeping them, as well as for the cost of the food and entertainment of the traveller. "The lien is the right of the creditor to retain the goods until the debt is paid." [3] It covers all property brought by the traveller to the inn, whether it be his own or not, and whether the fact that it is not his own be known to the innkeeper or not. "An innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; the innkeeper's lien attaches, and the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial." [4] In this case it was pointed out that the case of *Broadwood* [5] is not an authority for the argument that the innkeeper has no lien over goods which he knows to be the property of a third person,[4] and to that extent the statement of the law by Mr Bell [6] must be corrected.

459. The lien is not lost by the occasional and temporary absence of the guest *animo revertendi*,[7] nor by the innkeeper allowing the guest to go away without paying his bill, his luggage remaining in the inn.[8] But if the innkeeper waives his right of lien by permitting the guest to go away without paying and take with him the chattel to which the lien attached (for instance, in the case cited, a horse), then the lien is lost and does not revive if the guest returns later with the horse.[9] The lien attaches to all the property a guest brings to the inn for everything which he owes the innkeeper, whether in respect of food and lodging or feeding horses (or, it is thought, maintenance of cars), and it cannot be split up into parts. An innkeeper, therefore, may retain a horse for the personal expenses of the guest as well as for the horse's keep, and that though the animal belongs to a third party.[10]

460. The innkeeper may not at common law sell the property he holds under the lien. If he does, the sale operates an extinction of the lien, and the owner of the goods may bring an action against the innkeeper for their value.[10] But the Innkeepers' Act, 1878,[11] altered the

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[1] 1908 S.C. (H.L.), per Loreburn L.C. at p. 32.

[2] No cases yet figure in the books in which either motor-cars or aeroplanes are mentioned.

[3] *Mulliner* v. *Florence*, 1878, 3 Q.B.D. 484, per Bramwell L.J. at p. 489.

[4] *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 501, per Esher M.R. at pp. 505, 506.

[5] *Broadwood* v. *Granara*, 1854, 10 Ex. 417.

[6] Bell's Prin., s. 1428.

[7] *Allen* v. *Smith*, 1862, 12 C.B. (N.S.) 638.

[8] *Snead* v. *Watkins*, 1856, 1 C.B. (N.S.) 267.

[9] *Jones* v. *Thurloe*, 1723, 8 Mod. Rep. 172.

[10] *Mulliner* v. *Florence*, 1878, 3 Q.B.D. 484.

[11] 41 & 42 Vict. c. 38.

common law rule and gave the innkeeper, under certain conditions, a power of sale. It provides that, in addition to the right of lien, he shall be entitled to sell in order to pay a debt due, where the goods have been in his custody for six weeks without the debt having been satisfied. If the goods realise more than the debt and the expenses of the sale, he must, on demand, pay the balance to their former owner. At least one month before the sale takes place, he is required to insert an advertisement of it in a London newspaper and also in a country newspaper circulating in the district concerned. It is thought that this Act applies to Scotland, notwithstanding the latter provision.

Section 6.—Sale of Liquors.

Subsection (1).—*In General.*

461. In addition to the duties and obligations imposed by common law, the innkeeper is subject to many statutory regulations. A series of statutes, now consolidated in the Licensing (Scotland) Acts, 1903 to 1923, placed restrictions upon the sale of exciseable liquors. These statutes are dealt with *in extenso* elsewhere (see Licensing Laws), and in this article it is necessary to refer only to such of their provisions as apply more peculiarly to inns.

462. The Act of 1903 provides that no person shall be permitted to sell exciseable liquor without a license, and no license shall be granted until the applicant can produce a certificate granted by the proper licensing authorities—the justices in counties and the magistrates in burghs. These certificates are granted only upon certain conditions; and so innkeepers, licensed to sell exciseable liquors, are subject to many restrictions as to the hours when, the places where, and the persons to whom they may sell these liquors, and as to the conduct of their business generally. Most of these conditions are identical with those contained in the certificate for a public-house, but two are peculiar to inns.

Subsection (2).—*Supply to Lodgers and Travellers.*

463. An innkeeper, like any other licensed dealer in exciseable liquors, may not sell during prohibited hours, "with the exception of refreshment to travellers or to persons requiring to lodge in the said house or premises," or on Sundays "except for the accommodation of lodgers and travellers." Thus the only persons who can be supplied by an innkeeper during these prohibited times are lodgers and travellers. The power to supply lodgers during prohibited hours is not confined to the personal and individual wants of the lodger. The innkeeper may supply friends or guests of a lodger, provided that the refreshment is ordered and paid for by the lodger.[1] The law used to be the same in regard to the friends and guests of a *bona fide* traveller, but it is now

[1] *Gemmell* v. *Fleck*, 1882, 10 R. (J.) 17; *Murray* v. *M'Dougall*, 1883, 10 R. (J.) 42.

provided by statute that an innkeeper may not supply exciseable liquor on Sunday to any traveller, except for the personal use of, and to be drunk by, such traveller on the premises.[1] The section appears to leave unaltered the law as to supplying during prohibited hours other than on Sunday, nor does it apply where the friend is himself a *bona fide* traveller.[2] The onus is on the innkeeper to shew that he took reasonable precautions to ascertain the *bona fides* of the lodger or traveller.[3]

464. In England a person is not considered a *bona fide* traveller, so as to be entitled to be supplied with drink on Sundays, unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor.[4] In Scotland there is no decision as to the distance a person must travel on Sunday to become a *bona fide* traveller. In *Johnston* v. *Laing*, Lord Young said that he "thought that, in order to be a traveller, it was not necessary that a man should be travelling upon business, or otherwise than on foot. It was sufficient that he was from home fairly and honestly, not out for drink, but for exercise or legitimate amusement, such as the law allowed and at some distance from home. Upon the question of distance he thought that being four miles from home was abundantly sufficient to afford a reasonable excuse for having a glass of beer in a public-house." [5] But the traveller must still be *in itinere*. "The moment he reaches the place where he resides, he ceases to be a *bona fide* traveller." [6]

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[1] The Licensing (Scotland) Act, 1903, 3 Edw. VII. c. 25, s. 60.

[2] *Clyde* v. *Davidson*, 1910 S.C. (J.) 11.

[3] *Dickson* v. *Linton*, 1886, 14 R. (J.) 13; *Galloway* v. *Weber*, 1889, 16 R. (J.) 46; and *Brodie* v. *Dewar*, 1897, 25 R. (J.) 18.

[4] The Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 10.

[5] *Johnston* v. *Laing*, 1876, 3 Coup. 250, at p. 253; cp. *Dickson* v. *Linton*, *supra*.

[6] *Cairns* v. *Todd*, 1910 S.C. (J.) 17, per Lord Justice-Clerk Macdonald at p. 19; cp. *Galloway* v. *Weber*, 1889, 16 R. (J.) 46.

INNOMINATE RIGHTS.

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Section 1.—Definition.

465. Innominate rights are those which spring from such contracts or other sources of obligation as are not known to the law under a *nomen juris*. The distinction between nominate and innominate rights is as old as the science of law and legal remedy. In the civil law innominate contracts were regarded as real. To be binding, such a contract required that something should have been actually given or performed by one of the parties, otherwise it was a *nudum pactum* from which no right of action arose. Where there had been the requisite actings the civil law provided a remedy by the *actio in factum* or *præscriptis verbis*.[1] The history of the division of the Courts in England into Courts of law and Courts of equity affords another illustration of the same distinction.[2] Our law has rejected the distinction of the civil law between contracts and *nuda pacta*: and with us, accordingly, all contracts, nominate or innominate, are equally binding upon both parties from their date.[3]

Section 2.—Construction of Innominate Contracts.

466. The leading difference between nominate and innominate rights is, that in the case of nominate rights such as those which spring from the ordinary contracts of sale, lease, etc., the force of law, apart from the contract, invests the parties with certain rights and duties *hinc inde*, these being implied in the very name of the contract; innominate rights, on the other hand, derive their whole force, unaided by any implication of law, from the contract or other source of obligation from which they arise; in short, the rule is *pacta dant legem contractui*.[4] It follows that in questions of legal construction innominate are less favourably regarded than nominate contracts, and the Court will not be diligent to support the former if irregular or defective in point of form.

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[1] Gaius' Instit. iii. 89; Vinn. ad Inst. iii. 14, 2, 9; iii. 15; iii. 25, 1, 1.

[2] Snell, Principles of Equity, chap. i.

[3] Ersk. Inst. iii. 1, 35.

[4] Stair, i. 10, 12; cf. *Landless* v. *Wilson*, 1880, 8 R. 289, per Lord Pres. Inglis at p. 291; Gloag on Contract, p. 33.

Section 3.—Constitution and Proof.

467. As regards constitution and proof, the rule of our older law was that not only in regard to heritage but also in regard to moveables, contracts which are not distinguished by proper *nomina juris* could not, at least where the subject was beyond £100 Scots, be constituted verbally, or be proved by parole.[1] Since, however, the admission of parties as witnesses *in causa*, the tendency, here as elsewhere, has been towards the allowance of proof *prout de jure*. It is now settled that there is no general rule of law restricting the proof in innominate contracts to writ or oath;[2] that this restriction is only applicable to cases of innominate contracts, in which the terms are of an extraordinary or anomalous nature;[3] and that in other cases parole evidence is admissible as a means of proof.[4] The question whether a particular contract is unusual and anomalous is one on which there may be varying opinions, and it is difficult to extract from the decisions any certain guide to the exercise of what amounts to a discretion.[5] The opinion has been expressed by one judge that the discretion is not one suitable for exercise by the Court,[6] and in another case it was observed that the law upon the question of what can be proved by parole was so unsettled that the recent decisions, and particularly *Downie* v. *Black*, should be reconsidered by a larger Court.[7] In the latter case Lord President Dunedin expressed the opinion that there is no case which is authority for the view that an obligation to pay money, not incidental to one of the well-known consensual contracts, is provable in the law of Scotland otherwise than by writ or oath. The undernoted [8] appears to be such a case, and it is not doubtful that an agreement to compromise an action may be proved by parole.[9]

468. In cases in which parole proof is not admissible, *rei interventus* cannot be appealed to as confirming the contract, for it is clear that the very uncertainty which renders proof by witnesses of the terms of

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[1] Ersk. Inst. iv. 2, 20; see *Tassie* v. *M'Lintock*, 1764, 5 Bro. Supp. 899; *Edmonston* v. *Edmonston*, 1861, 23 D. 995, per Lord Benholme at p. 1001.

[2] *Forbes* v. *Caird*, 1877, 4 R. 1141.

[3] *Edmonston, supra; Taylor* v. *Forbes*, 1853, 24 D. 19; *Johnston* v. *Goodlet*, 1868, 6 M. 1067, 1072; see *Stewart & Craig* v. *Phillips*, 1882, 9 R. 501; *Reid* v. *Reid Bros.*, 1887, 14 R. 789; *Garden* v. *Earl of Aberdeen*, 1893, 20 R. 896; *Hendry* v. *Cowie & Sons*, 1904, 12 S.L.T. 31; *M'Murrich's Trs.* v. *M'Murrich's Trs.*, 1903, 6 F. 121; *Allison* v. *Allison's Trs.*, 1904, 6 F. 496; *Woddrop* v. *Speirs* (O.H.), 1906, 44 S.L.R. 22; 14 S.L.T. 319; *Copeland* v. *Wimborne*, 1912 S.C. 355.

[4] *Forbes* v. *Caird, supra; Thomson* v. *Fraser*, 1868, 7 M. 39; *Moscrip* v. *O'Hara*, 1880, 8 R. 36; *Downie* v. *Black*, 1885, 13 R. 271.

[5] *E.g.* cf. *Taylor* v. *Forbes, supra; vide Moscrip* v. *O'Hara, supra; Jacobs* v. *MacMillan*, 1899, 2 F. 79; and *Campbell* v. *Campbell's Exrs.*, 1910, 2 S.L.T. 240.

[6] Per Lord Salvesen in *Hallett* v. *Ryrie* (O.H.), 1907, 15 S.L.T. 367.

[7] *M'Fadzean's Exrs.* v. *Robert M'Alpine & Sons*, 1907 S.C. 1269, per Lord Pres. Dunedin and Lord Kinnear at p. 1273.

[8] *Craig* v. *Hill*, 1832, 10 S. 219; and cf. *Smith* v. *Reekie*, 1920 S.C. 188, at p. 192; see Contract, Vol. IV., *ante*, at p. 444.

[9] *Love* v. *Marshall*, 1872, 10 M. 795; *Anderson* v. *Dick*, 1901, 4 F. 68; *Torbat* v. *Torbat's Trs.*, 1906, 14 S.L.T. 830.

the contract incompetent makes it impossible to determine whether the acts founded on as forming *rei interventus* are referable to the contract or not.[1]

Section 4.—Rights over Heritage.

469. As regards innominate rights over heritage, the early development of the system of registration, with the consequent security for purchasers and creditors, has rendered our law extremely jealous of admitting any burdens upon property that are not disclosed by the records. Hence the rule of our law which, in spite of Erskine's dictum to the contrary,[2] seems to be well established, that in the case of servitudes—at least as regards negative servitudes which, not being dependent upon possession, are not apparent to third parties—only those which are well established and defined in our law can be constituted as real burdens on land so as to be effectual against singular successors.[3] See Servitudes.

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[1] *Edmonston* v. *Edmonston*, 1861, 23 D. 995.
[2] Ersk. Inst. ii. 9, 2.
[3] Bell's Prin., ss. 929, 998.

INNUENDO.

See DEFAMATION.

INQUEST.

See BRIEVE; JURY TRIAL.

IN RETENTIS.

See COMMISSION AND DILIGENCE.

INSANITY AND LUNACY.

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INTRODUCTION.

470. This subject falls naturally into three broad divisions, viz.: (1) the law relating to insanity as a source of civil incapacity; (2) the law relating to insanity as bearing upon criminal responsibility; and (3) the law relating to lunacy and mental deficiency. The first division consists mainly of common law, and is itself part of the law of status. The second is also mainly common law but includes certain statutory provisions of recent date with regard to mental defectives. The third is the creation of statute, and a department of the law relating to local administration.

PART I.—INSANITY AS A SOURCE OF CIVIL INCAPACITY.

Section 1.—Definition.

471. There is no absolute legal criterion as to what constitutes insanity.[1] As the mental capacity needed for any particular act depends on the nature of the act itself, so insanity, viewed as a source of civil incapacity, is a matter of degree. In charging a jury on a question of testamentary capacity, Lord President (then Lord Justice-Clerk) Inglis said: "I am not going to give you any definition of insanity, and I am not even going to define to you what legal capacity is in a question of this kind; because I may tell you at once that the question, whether a man is in such a state of mind as to be capable of executing a deed of this kind, is a question of fact, not a question of law. It may in some cases embrace questions of law, and it may also in some cases embrace questions . . . of medical science. In my humble opinion there is neither law nor medical science in this case." [2] Capacity being a matter of degree cannot possibly be tested without reference to the deed or transaction for which the capacity is required; for a man may be capable of one mental exertion yet wholly incapable of another.[3] Sec. 101 of the Court of Session Act, 1868,[4] gives a definition of insanity for the purpose of that Act, viz. a person is "to be deemed insane if he be furious or fatuous or labouring under such unsoundness of mind as to render him incapable of managing his affairs."

472. While at common law no absolute standard of capacity exists, a broad distinction has been drawn between (1) idiots and (2) furious persons. (1) Idiots are those persons whose condition is absolute imbecility of mind, an incapacity of incurable character, generally permanent and exclusive of those lucid intervals by which the violence of a lunatic or furious person is occasionally relieved. The law tends to treat idiots as permanent pupils, for though insanity is chiefly a question of fact, and not a status like minority, yet there is a strong presumption against recovery of capacity by an idiot.[5] (2) Furious persons are those who suffer from the more violent forms of insanity commonly called madness, lunacy, mania. While in this class of malady there is greater violence, there is also more likelihood of occasional relief in lucid intervals, during which legal capacity returns. Legal capacity, though embracing questions of law, is, in each case, largely a question of fact.[5]

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[1] Fraser, Husband and Wife, i. 55 *et seq.*; the difficulties of getting one are illustrated in *M'Kellar* v. *M'Kellar*, 1861, 24 D. 143, per Lord Pres. Colonsay at p. 144.

[2] *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625, at p. 631.

[3] *Ibid.; vide Williams* v. *Philip* (O.H.), 1907, 15 S.L.T. 396; *Moodie* v. *Stewart*, 1730, 1 Pat. 20.

[4] 31 & 32 Vict. c. 100.

[5] Bell, Com. i. 133.

Section 2.—Capacity to Contract.[1]

473. Neither "idiots nor furious persons, except in their lucid intervals, can contract." [2] Thus contracts purporting to have been made by them are void. If, however, necessaries are sold and delivered to an insane person, he must pay a reasonable price therefor.[3] The effect to be given to a contract entered into by an insane person depends upon whether that person was at the time when the contract was entered into of mind and capacity to understand and transact the business in question.[4] If his capacity was such that he could not have understood the business, the contract is not merely voidable but void *ab initio*, and cannot be homologated on his recovery.[5] The contract is null even though the mental incapacity of the party contracting has not been made public by any legal process,[6] or has not been established during his lifetime,[7] and even though third parties' rights have emerged.[8]

474. While the principles of English and Scots law are here generally the same,[9] there is no ground in Scots law for the English rule [10] that, in a question with the insane party himself, a contract concluded by him while insane is not *ipso facto* null and void, but only voidable if it can be established that the party contracting with him knew or ought to have known of his insanity.[11] On the other hand, where there is no insanity but only facility and circumvention,[5] a contract is not void *ab initio* but is only voidable.

475. Where a person, who while sane has entered into a contract, subsequently becomes insane, more difficult questions arise. No general rule can be laid down, except that it is clear that supervening insanity does not necessarily terminate a continuing contract. Thus the supervening insanity of a mandant will not invariably put an end to a mandate; [12] and an agent employed by a lunatic before a period of incapacity (which was of short duration) was held entitled to the amount of his business account for work done during that period.[13] In England it has been decided that supervening insanity ends a mandate to solicitors to continue the conduct of a litigation.[14] Supervening

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[1] See Gloag on Contract, 2nd ed., p. 92.

[2] Stair, i. 10, 13; Erskine, iii. 1, 16; Bell's Prin., s. 10; Gloag on Contract, 2nd ed., p. 92; Bell, Com. ii. 2, 8; *Gall* v. *Bird*, 1855, 17 D. 1027.

[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

[4] *John Loudon & Co.* v. *Elder's C. B.* (O.H.), 1923, S.L.T. 226.

[5] *Gall* v. *Bird*, *supra*.

[6] *Moncrieff* v. *Maxwell*, 1710, Mor. 6286; *Alexander* v. *Kinneir*, 1632, Mor. 6278.

[7] Ersk. i. 7, 51; *Loch* v. *Dick*, 1638, Mor. 6278; *Lindsay* v. *Trent*, 1683, Mor. 6280.

[8] *Lindsay* v. *Trent*, *supra*; *Hamilton* v. *Harvey*, 1818, 2 Mur. 38.

[9] *Towart* v. *Sellars*, 1817, 5 Dow 231, per Lord Eldon L.C. at p. 236; *John Loudon & Co.* v. *Elder's C. B.*, *supra*.

[10] See *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599.

[11] *John Loudon & Co.* v. *Elder's C. B.*, *supra*.

[12] *Pollok* v. *Paterson*, 10th December 1811, F.C.

[13] *Wink* v. *Mortimer*, 1849, 11 D. 995.

[14] *Yonge* v. *Toynbee*, [1910] 1 K.B. 215.

insanity of a partner does not necessarily end the partnership but is a ground on which the Court may order its dissolution.[1]

Section 3.—Testamentary Capacity.

476. Divergent views have been expressed as to whether less,[2] or more,[3] capacity is required to make a will or settlement than to transact a bargain. Capacity to assent being the requirement in both instances, it would seem that the criteria should be the same.[4] It is, however, not necessary that the granter of a testamentary deed should have full capacity; it is sufficient that he appreciates what is done.[5] Capacity being a matter of degree cannot be tested without reference to the deed in relation to which the question arises.[6] Thus, in determining the validity of a deed executed by a person whose capacity is in question, the rationality of the deed may be an important element, the more so if it has been framed by, or on the instructions of, the grantor.[7] On the other hand, the fact that the deed itself is not irrational does not exclude the possibility that it may quite well have been granted by a person whose incapacity prevented his fully appreciating its import.[6] Thus a will was reduced where the testator was shewn to have been mentally incapable of appreciating its import at the time of execution, notwithstanding that he himself had prepared the will six months before, when of full capacity.[8] A person who has been confined to a lunatic asylum may nevertheless grant a valid deed if it is established that he did so in a lucid interval.[9]

477. Where a person suffers from partial unsoundness of mind, the nature of the unsoundness must be looked to in ascertaining his legal capacity.[10] Such serious delusions as cannot fail to affect the whole mind destroy legal capacity.[11] Other delusions are not conclusive against capacity.[12] But a deed "cannot receive effect if it be shewn that its provisions were prompted by an insane delusion or delusions existing in the mind" of the granter.[13] Thus one testamentary writing was reduced where it was shewn that the testator laboured under delusions

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[1] Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35; *Cleghorn, Petr.* (O.H.), 1901, 8 S.L.T. 409.

[2] Bell, Com. i. 133; *Hogg* v. *Macgill*, 1828, 4 Mur. 449.

[3] *Ballantyne* v. *Evans*, 1886, 13 R. 652, per Lord Young at p. 667; *Dewar* v. *Mackay*, 1836, 14 S. 1132.

[4] Gloag on Contract, 2nd ed., p. 93. [5] *Campbell* v. *Davidson*, 1827, 4 Mur. 179.

[6] *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625, per Lord Justice-Clerk Inglis at p. 631.

[7] *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937.

[8] *Laidlaw* v. *Laidlaw*, 1870, 8 M. 882.

[9] *Nisbet's Trs.* v. *Nisbet, supra; Cartwright* v. *Cartwright*, 1793, 1 Phil. 90, at p. 100; *cf.* Bell, Com. i. 134.

[10] See *Sivewright* v. *Sivewright's Trs.*, 1920 S.C. (H.L.) 63; 1919, 2 S.L.T. 261; *Nisbet's Trs.* v. *Nisbet, supra.*

[11] *Nisbet's Trs.* v. *Nisbet, supra*, per Lord Ardmillan at p. 949.

[12] *Sivewright* v. *Sivewright's Trs., supra.*

[13] *Hope* v. *Hope's Trs.*, 1898, 1 F. (H.L.) 1, per Lord Watson at p. 2; *Sivewright* v. *Sivewright's Trs., supra.*

respecting his property;[1] another was not, because it was established that though the testator was suffering from a delusion, the delusion (viz. that he had committed a serious crime) was not such as to affect the subject-matter of the deed.[2]

478. Where a mutual settlement is executed by two persons, one of whom is subsequently found to have been insane at the date of execution, the settlement remains effectual *quoad* the granter whose capacity is not in question.[3] Where a testator loses capacity subsequent to the execution of his settlement, the settlement is not thereby rendered invalid. A question has, however, been raised as to whether he is to be presumed to know any change of law supervening after the commencement of his incapacity.[4]

Section 4.—Capacity in Relation to Marriage.[5]

479. A marriage may be reduced if it is established that one of the parties to it was insane at the time when the marriage took place.[6] The test of capacity to enter into a marriage is not "whether [the party whose capacity is questioned] was aware that [he] was going through the ceremony of marriage, but whether [he] was capable of understanding the nature of the contract [he] was entering into, free from the influence of morbid delusions on the subject."[7] The result of this test can be determined only by an examination of the facts of each case.[8] The view has, however, been expressed that marriage is a simple contract, not requiring a high degree of intelligence.[9] A marriage contracted during a lucid interval is valid. The burden of establishing incapacity to marry ordinarily lies upon the party asserting it; but if insanity existed shortly before the marriage the onus may shift so as to place upon the defender the burden of establishing that marriage took place during a lucid interval.[10]

480. An action to reduce the marriage may always competently be brought by the sane spouse. It would appear that it may be brought by the insane spouse on his recovery.[10] The title to reduce the marriage is confined to the spouses during their lifetime, unless there has been a judicial determination as to insanity.[10] If, however, the insane spouse has been cognosced, his curator has a title to sue for reduction of the marriage.[11] After the death of either spouse, any person who can

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[1] *Maitland's Trs.* v. *Maitland*, 1871, 10 M. 79.

[2] *Ballantyne* v. *Evans*, 1886, 13 R. 652.

[3] *Graeme* v. *Graeme's Trs.*, 1869, 7 M. 1062. [4] *Maxwell* v. *Maxwell*, 1864, 3 M. 318.

[5] See Walton on Husband and Wife, 2nd ed., p. 8; Fraser on Husband and Wife, i. 55 *et seq.*

[6] Stair, i. 4, 6; Ersk. i. 6, 2; Fraser on Husband and Wife, i. 55; Walton on Husband and Wife, p. 8; *Hancock* v. *Peaty*, 1867, L.R. 1 P. & D. 335; *Park* v. *Park* (O.H.), 1914, 1 S.L.T. 88. [7] *Hunter* v. *Edney*, 1881, 10 P.D. 93, at p. 95.

[8] *Park* v. *Park*, *supra*; *Graham* v. *Graham*, 1907, 15 S.L.T. 33; *Jackson* v. *Jackson*, [1908] P. 308. [9] *Durham* v. *Durham*, 1885, 10 P.D. 80, at p. 82.

[10] *Turner* v. *Meyers*, 1808, 1 Hagg. C.R. 414, at p. 419.

[11] Fraser on Husband and Wife, i. 74.

qualify an interest may sue.[1] That there are issue of the marriage is no bar to decree.[2] An insane person may on recovery homologate a marriage contracted by him while insane; or the marriage may become valid by acquiescence.[3] It has not been decided whether the marriage can be annulled if the sane spouse, ignorant of the other spouse's incapacity at the date of the marriage, prefers on discovery to retain the tie.[4]

481. Insanity supervening after a marriage has been validly contracted is not a ground for reducing the marriage,[5] or for obtaining a judicial separation, even though the sane spouse suffers from violent acts done under its influence.[6] Supervening insanity is no bar to an action of divorce for adultery committed by one spouse while sane.[7] Where a spouse who has been in desertion for four years becomes insane thereafter, an action of divorce on the ground of desertion may competently be brought.[8] Where, however, the defender was proved to have been insane during part of the four years' period, the action was dismissed.[9] A promise of marriage becomes incapable of fulfilment by supervening insanity, and accordingly no action of damages will lie for its breach.[10]

Section 5.—Capacity to Act as Trustee.

482. An insane person is incapable of acting as trustee.[11] Where a trustee became incapable of acting through supervening insanity, the Court authorised the *curator bonis* appointed to the *incapax* to resign the trusteeship on behalf of his ward.[12] Where a trustee who had resigned from a trust became insane before executing a transfer in favour of her co-trustees of certain War Stock held by the trust, the Court authorised her *curator bonis* to execute the transfer on her behalf.[13] Where a trustee, in whom was vested a power of appointment over a bequest, became *incapax*, the power of appointment was held to have flown off and the bequest to have become unqualified by the power.[14]

Section 6.—Capacity to Litigate.

Subsection (1).—*Capacity to Sue.*

483. It is incompetent to raise an action or other form of process in name of an insane person, even though he has not been cognosced

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[1] Fraser on Husband and Wife, i. 74; *Christie* v. *Gib*, 1700, Mor. 6283; *Loch* v. *Dick*, 1638, Mor. 6278.
[2] *Jackson* v. *Jackson*, [1908] P. 308.
[3] *Johnston* v. *Brown*, 1823, 2 S. 495.
[4] Fraser on Husband and Wife, i. 79.
[5] *Parnell* v. *Parnell*, 1814, 2 Hagg. C.R. 169.
[6] Fraser on Husband and Wife, ii. 891.
[7] *Mordaunt* v. *Moncrieffe*, 1874, L.R. 2 H.L. (Sc. & Div.) 374; *Rossie* v. *Rossie* (O.H.), 1899, 6 S.L.T. 357.
[8] *Scott* v. *Scott*, 1908 S.C. 1124.
[9] *Gilfillan* v. *Gilfillan* (O.H.), 1902, 10 S.L.T. 295.
[10] *Liddell* v. *Easton's Trs.*, 1907 S.C. 154.
[11] M'Laren, Wills and Succession, 3rd ed., p. 882.
[12] *Laidlaw, Petr.*, 1882, 10 R. 130.
[13] *Pennycuick*, 1925 S.N. 57.
[14] *Hill's Trs.* v. *Thomson*, 1874, 2 R. 68.

and the action has been raised with the purpose of having a *curator ad litem* appointed as soon as the cause has come into Court.[1] Thus an action of separation and aliment at the instance of an insane person was held incompetent.[2] Nor will the Court appoint a *curator ad litem* to an insane person in reference to an action by him which has not been actually raised.[3] The proper course is (1) to petition for the appointment of a *curator bonis* [4] or to have the *incapax* cognosced; and thereafter (2) to raise an action at the instance of the *curator bonis*, tutor-at-law or tutor-dative, as the case may be. It is, however, competent to present to the Court a special case where one of the parties is *incapax*, provided that his interest is identical with and covered by the interest of other parties who are *capax*.[5]

Subsection (2).—*Capacity to Defend.*

484. An insane person cannot be made the defender in an action, but in certain circumstances it may be defended on his behalf. Three cases may be considered, viz. : (1) where the *incapax* has been cognosced ; (2) where, though not cognosced, a *curator bonis* has been appointed to manage his estate ; and (3) where he has neither been cognosced nor received a curator. Where the *incapax* has been cognosced an action may be brought against his tutor alone. Where he has not been cognosced but has had a curator appointed, the action should be brought against both *incapax* and curator, not against the curator alone.[6] Where a Sheriff Court action was brought against a person whose whole property was vested in trustees, and the trustees appearing alleged that the defender was insane, the Sheriff sustained an objection against their title to appear and defend; but the objection was cured by the appearance in an advocation of the defender and a *curator bonis* subsequently appointed.[7] Where the *incapax* has neither been cognosced nor received a *curator bonis*, he cannot ordinarily be convened as defender. It has, however, been held to be competent to bring an action of divorce, on the grounds of adultery [8] or desertion,[9] against an insane defender where at the time of committing the matrimonial offence the defender was sane. In such cases the Court will, on the pursuer's motion, appoint a *curator ad litem*.[10] The Court may always appoint a *curator ad litem* to an insane person in a litigation which may affect his interests.[11]

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[1] *Reid* v. *Reid*, 1839, 1 D. 400 ; *Mackenzie, Petr.*, 1845, 7 D. 283.
[2] *Thomson* v. *Thomson*, 1887, 14 R. 634.
[3] *Wallace, Petr.*, 1830, 9 S. 40.
[4] *Mackenzie, Petr., supra.*
[5] *Macdonald's Trs.* v. *Medhurst*, 1915 S.C. 879.
[6] *Govan* v. *Thomson*, 20th December 1814, F.C.
[7] *Lindsay* v. *Watson*, 1843, 5 D. 1194.
[8] *Rossie* v. *Rossie* (O.H.), 1899, 6 S.L.T. 357.
[9] *Scott* v. *Scott*, 1908 S.C. 1124 ; cf. *Gilfillan* v. *Gilfillan* (O.H.), 1902, 10 S.L.T. 295.
[10] *Rossie* v. *Rossie, supra ; Scott* v. *Scott, supra.*
[11] Cf. *Drummond's Trs.* v. *Peel's Trs.*, 1929 S.N. 47.

Subsection (3).—*Supervening Incapacity.*

485. Where a party to an action becomes insane during the dependence of the action, a *curator bonis* and not merely a *curator ad litem* should be appointed, and opportunity will be given by the Court for the application for that appointment to be made.[1] If those parties interested in the appointment of a *curator bonis* fail to avail themselves of the opportunity given for the application, the Court may, on the motion of the opposing party, appoint a *curator ad litem.*[2]

Section 7.—Capacity to give Evidence.

486. A person who is clearly insane is not a competent witness. But there are many degrees of mental weakness, short of complete incapacity, where the Court will admit the witness and subject his evidence to stricter scrutiny. Thus a witness will not be excluded merely because his faculties are impaired.[3] But the fact that he is of weak intellect may render him inadmissible where his evidence is required, not on simple facts, but on legal deductions resulting from them.[4] The Court will apparently not reject a witness, whose incapacity has not been publicly ascertained by judicial process, without first obtaining medical evidence as to his incapacity.[5] A witness is not rendered inadmissible by reason of being an inmate of a lunatic asylum, though before receiving his evidence the Court may require evidence of his mental condition.[6] A distinction may be drawn between persons wholly deranged and persons suffering from a restricted form of mental weakness. Thus a witness who suffers merely from occasional attacks of insanity is generally admissible during lucid intervals.[7] Where insanity has supervened between the date of the occurrences of which the witness speaks and the date of his giving evidence, he may be rendered inadmissible on the ground that he is likely to confound his intervening delusions with his sane recollections.[8] In such a case he will be inadmissible if the lucid intervals delimiting the intervening period of insanity are not of substantial duration and clearly defined.[9] Minor delusions or mental weakness such as do not affect a witness's capacity to understand the nature of his oath will not render him inadmissible.[10] But he may be rejected where, being of full age, he

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[1] *Anderson's Trs.* v. *Skinner*, 1871, 8 S.L.R. 325.
[2] *Mitchell* v. *Whitelock*, 1864, 3 M. 229; *Walker* v. *Jones*, 1867, 5 M. 358.
[3] *H.M. Adv.* v. *Stott*, 1894, 1 Adam 386.
[4] *Buckle* v. *Buckle's Curator*, 1907, 15 S.L.T. 98.
[5] *Riley* v. *M'Laren*, 1853, 16 D. 323.
[6] *H.M. Adv.* v. *Sheriff and Mitchell*, 1866, 5 Irv. 226; *H.M. Adv.* v. *Coupland and Beattie*, 1863, 4 Irv. 370; *H.M. Adv.* v. *Littlejohn and Gall*, 1881, 4 Coup. 454.
[7] *Tosh* v. *Ogilvy*, 1873, 1 R. 254.
[8] Hume, ii. 340; *H.M. Adv.* v. *Sheriff and Mitchell, supra; H.M. Adv.* v. *M'Kenzie*, 1869, 1 Coup. 244.
[9] Stair, iv. 43, 7.
[10] *R.* v. *Hill*, 1851, 1 Temple & Mew 582.

does not even understand the nature of the oath; [1] and a witness has been rejected where there was a conflict of medical testimony upon his understanding of the oath.[2]

487. Where a witness has been objected to as insane, his incapacity is usually established by the evidence of doctors and others acquainted with him. The individual may himself be examined.[3] But a witness is not compelled, on a motion to that effect by the party asserting his incapacity, to submit to medical examination before giving evidence.[4] In the case of evidence taken on commission, if the state of mind of a witness is in doubt, the Commissioner must satisfy himself as to the witness's condition before administering the oath or taking his deposition, and on his report the Court will determine whether he acted rightly.[5] The evidence of an inmate of an asylum relating to an event which occurred when she was in a weak state of mind was admitted on commission, under reservation as to its effect.[6] In one case the Court granted a commission to take the evidence of a lunatic (providing, however, that the examination was only to take place on the Commissioner being satisfied by the evidence of the asylum doctor that the same would not injuriously affect the witness).[7]

488. Though the statement of an insane person is not generally admissible as evidence, it may be considered as an element in determining his state of mind. Thus while the declaration of an insane prisoner is inadmissible, it may be used to indicate his mental condition at the time at which it was made. The same use may be made of memoranda prepared by an insane person.[8] Where a witness becomes inadmissible through supervening permanent insanity, hearsay evidence is apparently competent of statements made by him while sane, provided that it has first been established to the satisfaction of the Court that there is no reasonable likelihood of the witness recovering sanity.[9]

Section 8.—Ascertainment of Incapacity.

Subsection (1).—*Procedure.*

489. The presumption of sanity may be overcome and the existence of incapacity established by the following processes:—

(1) Brieve of cognition.[10] See Brieve.[11]

(2) (*a*) Petition for the appointment of *curator bonis* or judicial factor. This is now the usual form of procedure when the object is to protect the patrimonial interests of the alleged *incapax*. The petition

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[1] *H.M. Adv.* v. *White*, 1842. 1 Broun 228.
[2] *H.M. Adv.* v. *Black*, 1887, 1 White 365.
[3] Dickson on Evidence, 3rd ed., s. 1554.
[4] *M'Intyre* v. *M'Intyre* (O.H.), 1920, 1 S.L.T. 207.
[5] *Riley* v. *M'Laren*, 1853, 16 D. 323.
[6] *Tosh* v. *Ogilvy*, 1873, 1 R. 254.
[7] *Parish Council of Kilpatrick* v. *Parish Council of Row*, 1911, 2 S.L.T. 32.
[8] Dickson on Evidence, 3rd ed., ss. 252, 316.
[9] *Ibid.*, s. 268.
[10] Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 101; C.A.S., D, vi.
[11] Vol. II. p. 373, *ante*.

may be presented by any person qualifying an interest in the estate of the *incapax*,[1] or, in certain circumstances, by the Lord Advocate.[2] See JUDICIAL FACTOR.

(*b*) Petition for the appointment of the nearest male agnate as tutor-at-law.[3]

(3) Action of reduction. This procedure is appropriate for setting aside a deed on the ground that the grantor was *incapax* at the time of execution. The incapacity is, in this form of process, established only in so far as the deed in question is concerned. In such an action a general averment of insanity is not sufficient. Thus where it was averred that a testator was not of sound disposing mind, and no facts and circumstances were averred from which the testator's incapacity might be inferred, the action was dismissed as irrelevant.[4]

SUBSECTION (2).—*Evidence.*

490. The question whether a person's state of mind was such as to render him incapable of entering into a particular transaction or granting a particular deed is principally a question of fact, ordinarily established by medical evidence as to the condition of the alleged *incapax*. Medical certificates as to insanity must be on soul and conscience.[5] In a criminal case it has been held that witnesses other than skilled medical men might competently be examined as to the mental condition of the alleged *incapax*.[6] A statement or writing of the alleged *incapax* himself, while not generally admissible, may be considered as an element in determining his state of mind.[7] The inferences to be drawn from evidence of peculiarities in manner, speech, behaviour, and letters of the alleged *incapax* are questions for the jury, in which their opinion may be guided, but is not to be determined, by the skilled medical evidence.[8] It is generally inadmissible to ask of a witness his opinion as to the mental condition of the alleged *incapax*,[9] though he may be asked his inferences deduced from minor circumstances.[10]

491. Evidence of the insanity of relatives of the alleged *incapax* has been held to be incompetent in a civil case,[11] and generally in criminal cases.[12] In a recent civil case, however, averments that a mental

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[1] *Ross, Petrs.*, 1851, 13 D. 950.

[2] See Lunacy Act, 1857 (20 & 21 Vict. c. 71), s. 81, as amended by the Mental Deficiency and Lunacy Act, 1913 (3 & 4 Geo. 5, c. 38), s. 62; and para. 517, *infra*.

[3] *Dick* v. *Douglas*, 1924 S.C. 787, is the latest reported instance of the procedure.

[4] *Hope* v. *Hope's Trs.*, 1896, 23 R. 513, per Lord Kincairney at p. 518; 1898, 1 F. (H.L.) 1, per Lord Shand at p. 3.

[5] *Campbell, Petrs.*, 1830, 8 S. 307 n.

[6] *H.M. Adv.* v. *Dingwall*, 1867, 5 Irv. 466.

[7] Dickson on Evidence, 3rd ed., ss. 252, 316; see para. 488, *supra*.

[8] *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 625.

[9] *Mackenzie* v. *Roy*, 1830, 5 Mur. 260.

[10] Dickson on Evidence, 3rd ed., ss. 391, 392.

[11] *MacAdam* v. *Walker*, 1813, 1 Dow 177 (on appeal the point was not decided); Dickson on Evidence, 3rd ed., s. 3.

[12] *H.M. Adv.* v. *Paterson*, 1872, 2 Coup. 222; *H.M. Adv.* v. *Dingwall*, *supra*; *H.M. Adv.* v. *Edmonstone*, 1909, 2 S.L.T. 223; but see *H.M. Adv.* v. *Galbraith*, 1897, 5 S.L.T. 65.

disease was hereditary were held relevant on the ground that the opinion of medical experts as to the significance of the family and personal history of the alleged *incapax* was relevant to the question in issue, and the facts upon which such opinion was based might also be proved in order properly to apply the medical opinion to that question.[1]

492. There is a general presumption in favour of sanity. The onus of proving insanity is in the first instance upon the party asserting it.[2] Once, however, insanity of a continuing character has been established, the onus will shift so as to lay upon the party asserting a lucid interval the burden of proving it.[3] Thus where a pursuer, seeking to reduce a marriage, establishes that shortly before the marriage one of the contracting parties was insane, the onus is upon the defender to prove that the marriage took place during a lucid interval.[4] Proof that death was by suicide does not discharge the burden of establishing insanity shortly before death,[5] and a medical certificate of insanity granted at one date raises no presumption of insanity at an earlier date.[6] These decisions support the view that where insanity is established at a given date, the ordinary presumption of sanity is unaffected thereby as regards any prior period but may be rebutted thereby as regards a subsequent period. It would seem that the onus of proving a lucid interval is heavier in the case of idiocy than in that of furiosity, there being a stronger presumption against recovery of capacity by an idiot.[7]

PART II.—INSANITY IN RELATION TO CRIMINAL RESPONSIBILITY.

493. This subject is discussed in an earlier volume.[8] Insanity or idiocy is a complete defence against a criminal charge and exempts from conviction and punishment.[9] It is immaterial that the person charged has recovered since, if he was insane at the time of committing the crime.[10] Weakness of mind short of insanity may affect the degree of responsibility for crime or may afford a ground for mitigation of punishment.[8] Special statutory provision has been made with regard to mental defectives.[11]

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[1] *Houston* v. *Aitken*, 1912 S.C. 1037.
[2] Fraser on Husband and Wife, i. 55 *et seq.*
[3] Bell, Com. i. 134; *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937; *Turner* v. *Meyers*, 1808, 1 Hagg. C.R. 414, at p. 419.
[4] *Turner* v. *Meyers*, *supra*, at p. 419.
[5] *Walker* v. *Macadam*, 1806, 1 Dow 187; Dickson on Evidence, 3rd ed., s. 29.
[6] *Stirling Parish Council* v. *Dunblane Parish Council*, 1912 S.C. 316.
[7] Bell, Com. i. 133; see para. 472, *supra*.
[8] See CRIME, Vol. V., *ante*, at p. 57 *et seq.*
[9] Macdonald, Criminal Law, 2nd ed., p. 11.
[10] Hume, p. 39; Macdonald, p. 12.
[11] 3 & 4 Geo. V. c. 38, ss. 1, 9, 10.

PART III.—THE LAW RELATING TO LUNACY AND MENTAL DEFICIENCY.

Section 1.—The Lunacy Acts.[1]

494. The care and treatment of lunatics are regulated by the Lunacy (Scotland) Acts, 1857 to 1919, a short title given by the Mental Deficiency and Lunacy (Amendment) Act, 1919, which comprises: the Lunacy (Scotland) Act, 1857;[2] the Lunacy (Scotland) Act, 1862;[3] the Lunacy (Scotland) Act, 1866;[4] the Criminal and Dangerous Lunatics (Scotland) Amendment Act, 1871;[5] the Lunacy Districts (Scotland) Act, 1887;[6] the Lunacy Board (Scotland) Act, 1864;[7] the Prisons (Scotland) Act, 1877, ss. 61 to 63;[8] the Lunacy Board (Scotland) Salaries and Clerks Act, 1900;[9] the Mental Deficiency and Lunacy (Scotland) Act, 1913, Parts II. and V.;[10] and the Mental Deficiency and Lunacy (Amendment) Act, 1919.[11] In addition to the above leading enactments, there are also the following: the Criminal Lunatics Act, 1800;[12] the Poor Law (Scotland) Act, 1845;[13] the Court of Session Act, 1868;[14] the Criminal Lunatics Act, 1884;[15] the Local Government (Scotland) Act, 1889;[16] the Lunacy Act, 1890;[17] the Asylum Officers Superannuation Act, 1909;[18] the Criminal Appeal (Scotland) Act, 1926;[19] and the Local Government (Scotland) Act, 1929.[20]

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[1] The more important of these are conveniently collected in The Councillor's Manual, 12th ed.

[2] 20 & 21 Vict. c. 71.

[3] 25 & 26 Vict. c. 54.

[4] 29 & 30 Vict. c. 51.

[5] 34 & 35 Vict. c. 55.

[6] 50 & 51 Vict. c. 39; this and the foregoing are collectively entitled the Lunacy (Scotland) Acts, 1857 to 1887; see 59 & 60 Vict. c. 14.

[7] 27 & 28 Vict. c. 59.

[8] 40 & 41 Vict. c. 53.

[9] 63 & 64 Vict. c. 54.

[10] 3 & 4 Geo. V. c. 38.

[11] 9 & 10 Geo. V. c. 85.

[12] 39 & 40 Geo. III. c. 94.

[13] 8 & 9 Vict. c. 83, s. 59 (in part repealed by 38 & 39 Vict. c. 66).

[14] 31 & 32 Vict. c. 100, ss. 101, 102.

[15] 47 & 48 Vict. c. 64.

[16] 52 & 53 Vict. c. 50, ss. 11 (5), 22 (5).

[17] 53 & 54 Vict. c. 5, ss. 86–89, 131; s. 87 amended by 3 & 4 Geo. V. c. 38, s. 19 (5).

[18] 9 Edw. VII. c. 48.

[19] 16 & 17 Geo. V. c. 15, ss. 3 (3), 18.

[20] 19 & 20 Geo. V. c. 25; the date at which this Act comes generally into operation is 16th May 1930; see s. 80 (2). See also the Lunatics Removal (India) Act, 1851 (14 & 15 Vict. c. 81); the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), ss. 69, 80 (as amended by 5 Geo. V. s. 9 and 12 & 13 Geo. V. s. 4, and in part repealed by 47 & 48 Vict. c. 64, s. 17); the National Debt Act, 1870 (33 & 34 Vict. c. 71), ss. 19, 73; the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), s. 6; the Army Act, 1881 (44 & 45 Vict. c. 58), ss. 91, 130 (as amended and in part repealed); the Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), s. 3; the Lunacy (Vacation of Seats) Act, 1886 (49 & 50 Vict. c. 16); the Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 7 (1); the Army (Annual) Act, 1890 (53 & 54 Vict. c. 5), s. 6; the Education, etc. (Scotland) Act, 1892 (55 & 56 Vict. c. 51), s. 2 (3); the Army (Annual) Act, 1894 (57 & 58 Vict. c. 3), s. 5; the Air Force Act, 1917 (7 & 8 Geo. V. c. 67), ss. 91, 130; the Housing, etc. Act, 1923 (13 & 14 Geo. V. c. 24), ss. 1, 23 (6); the Housing, etc. Act, 1924 (14 & 15 Geo. V. c. 35), ss. 2 (3), 16 (2); the Army and Air Force (Annual) Act, 1926 (16 & 17 Geo. V. c. 6), ss. 8, 11; the Rating (Scotland) Act, 1926 (16 & 17 Geo. V. c. 47).

Section 2.—The Mental Deficiency Acts.[1]

495. The care and treatment of mental defectives are regulated by the Mental Deficiency and Lunacy (Scotland) Act, 1913;[2] the Asylums and Certified Institutions (Officers' Pensions) Act, 1918;[3] the Mental Deficiency and Lunacy (Amendment) Act, 1919;[4] and the Local Government (Scotland) Act, 1929.[5]

Section 3.—Central and Local Authorities.

496. The Local Government (Scotland) Act, 1929,[6] reduces the authorities charged with administering the Acts relating to Lunacy and Mental Deficiency to three classes:

Subsection (1).—*The Secretary of State for Scotland.*

497. He is the minister charged with general administration in questions of lunacy and mental deficiency.[7]

Subsection (2).—*The Board of Control.*

(i) *Constitution.*

498. The central administrative body for the purposes of the Lunacy Acts and Mental Deficiency Acts is the General Board of Control for Scotland. The Board of Control is constituted as follows: (1) Three Commissioners are appointed by His Majesty, one of whom is unpaid and chairman of the Board, while the other two are paid Commissioners; (2) a third paid Commissioner may also be appointed, who is to be a duly qualified medical practitioner; (3) other three unpaid Commissioners may also be appointed.[8] The Secretary of State may also appoint two medical persons as paid Deputy-Commissioners,[9] and with the approval of the Treasury he may appoint as paid Deputy-Commissioners other four duly qualified medical practitioners, of whom at least one must be a woman.[10] A Commissioner or Deputy-Commissioner is disqualified who has or acquires an interest in an establishment for lunatics or defectives.[11] The Commissioners must

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[1] See Graham on The Mental Deficiency and Lunacy (Scotland) Act, 1913.
[2] 3 & 4 Geo. V. c. 38. [3] 8 & 9 Geo. V. c. 33. [4] 9 & 10 Geo. V. c. 85.
[5] 19 & 20 Geo. V. c. 25; the date at which this Act comes generally into operation is 16th May 1930; see s. 80 (2).
[6] Taking effect as from 16th May 1930; see s. 80 (2).
[7] The Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 5; the Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52); the Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20), s. 4 (2) (*a*) (5), Sched. I. (by which the powers of the Secretary for Scotland as to lunacy were made transferable to the Scottish Board of Health: a transfer which never took place); the Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34).
[8] Lunacy (Scotland) Act, 1857, s. 4; Mental Deficiency and Lunacy (Scotland) Act, 1913, s. 19 (1) (2) (4). [9] 1857 Act, s. 21; Lunacy Board (Scotland) Act, 1864, s. 2.
[10] 1913 Act, s. 19 (3). [11] *Ibid.*, s. 20.

not derive any profit or emolument for the discharge of their duties other than their salary.[1] They receive personal immunity in respect of their official acts.[2] His Majesty may also appoint a paid secretary to the Board,[3] and the Board may appoint paid clerks.[4] The same disqualification attaches to the offices of secretary and officer of the Board as to that of Commissioner.[5] The Board has its office and meets in Edinburgh. At meetings the chairman has an original and casting vote. The Board may appoint committees consisting of two or more of its members.[6]

(ii) *Functions under the Lunacy Acts.*

499. The Board of Control has, in addition to the special powers committed to it under the Acts, the general superintendence, management, and regulation of all matters arising under the Acts in relation to lunatics, and to public, private, and district asylums and lunatic wards of poorhouses, and to every house where a lunatic is detained under an order of the Sheriff or Board; and has power to grant, refuse, recall, or suspend licences for private asylums, and to make, subject to approval by the Secretary of State, regulations for the management of private and district asylums,[7] and to institute necessary inquiries.[8] The Board has also the following special powers and duties: (1) it must investigate the requirements of districts and determine the asylum accommodation requisite for each district,[9] and it has powers to enforce, if necessary, execution of its determinations;[10] (2) it must approve plans, specifications, and estimates not merely for district asylums, but also for public and private asylums and lunatic wards of poorhouses;[11] (3) it must provide for the periodical visitation and examination of lunatics (*a*) generally,[12] (*b*) in prisons,[13] (*c*) in poorhouses,[14] (*d*) in private houses;[15] (4) it must keep a general register of lunatics[16] and superintend asylum registers;[17] (5) it must submit annual reports to the Secretary of State;[18] (6) it may take steps for the protection of the property of lunatics;[19] (7) it licenses private asylums,[20] private houses receiving lunatics,[21] lunatic wards in poorhouses,[22] and institutions for imbecile children;[23] (8) it fixes the numbers of patients, of various classes, to be received in any public or district asylums.[24]

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[1] 1857 Act, s. 8. [2] *Ibid.*; Lunacy (Scotland) Act, 1866, s. 23.
[3] 1857 Act, s. 13; Lunacy Board (Scotland) Act, 1864, s. 2; Lunacy Board (Scotland) Salaries and Clerks Act, 1900, s. 2.
[4] 1857 Act, s. 16; 1864 Act, s. 2; 1900 Act, ss. 1, 2. [5] 1913 Act, s. 20.
[6] 1857 Act, ss. 5, 6. [7] *Ibid.*, ss. 9, 10; 1913 Act, s. 70.
[8] 1857 Act, ss. 11, 12. [9] *Ibid.*, ss. 49, 51–53.
[10] *Ibid.*, ss. 72, 111; Lunacy (Scotland) Act, 1862, s. 9. [11] 1913 Act, s. 51.
[12] 1857 Act, s. 17; 1913 Act, s. 54. [13] 1857 Act, s. 18.
[14] *Ibid.*, s. 19. [15] *Ibid.*, s. 42; 1913 Act, s. 57.
[16] 1857 Act, s. 98. [17] *Ibid.*, s. 96.
[18] *Ibid.*, s. 102; the Secretary to the Board also reports to H.M. Treasury; *ibid.*, s. 14.
[19] 1857 Act, ss. 81, 82. [20] *Ibid.*, s. 27 *et seq.*
[21] 1862 Act, s. 5. [22] *Ibid.*, s. 3.
[23] 1913 Act, s. 29. [24] *Ibid.*, s. 52.

(iii) *Functions under the Mental Deficiency Acts.*

500. The Board has, in addition to the special powers committed to it under the Acts, the general superintendence of matters relating to the supervision, protection, and control of defectives.[1] It has special powers and duties in relation to defectives, similar to those which it has under the Lunacy Acts.[2] The Board has also power, where it is expedient, to transfer patients from lunatic asylums to institutions for defectives, and *vice versa*.[3]

SUBSECTION (3).—*Local Authorities.*

501. The Lunacy (Scotland) Act, 1857, divided Scotland, for the purposes of the Lunacy Acts, into eight districts, viz. Edinburgh, Inverness, Aberdeen, Perth, Dumfries, Glasgow, Stirling, and Renfrew, for each of which there was established a District Board of Lunacy.[4] It was the primary function of the District Board of Lunacy to assume charge of any district asylum which was ready for the reception of lunatics, and which had been approved by the Board; and to the District Board of Lunacy were entrusted the management and superintendence, well-ordering, and discipline of district asylums within its district.[5] The Mental Deficiency and Lunacy (Scotland) Act, 1913, converted the District Board of Lunacy into the District Board of Control, and added to its existing functions the general superintendence of defectives within its district.[6] The Act of 1913 further imposed upon school boards and parish councils the duty of supervising and making suitable provision for certain defectives supported at the public expense.[7]

502. By virtue of the Local Government (Scotland) Act, 1929,[8] the functions of each District Board of Control with regard to both the Lunacy and the Mental Deficiency Acts and the functions of the parish council with regard to the Mental Deficiency Acts were transferred to (*a*) the county council so far as the functions related to the county (including the small burghs therein) or a portion thereof; and (*b*) the town council of a large burgh so far as the functions related to the large burgh or a portion thereof.[9] The new authorities were empowered to levy a rate to defray expenses incurred by them in the exercise of these functions.[10] The Act of 1929 also provided that the town council of a burgh being a county of a city was to be the education authority for that burgh, and the county council of a county to be the education authority of that county, including any burgh other than a county of a city situate therein; and transferred to such town and county councils the functions of education authorities (themselves the successors

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[1] 1913 Act, s. 24. [2] *Ibid.*, ss. 25, 29, 31, 39. [3] *Ibid.*, s. 16.
[4] 1857 Act, s. 49 and Sched. H. [5] *Ibid.*, ss. 68, 69.
[6] See especially 1913 Act, ss. 26 (as partially repealed by the Local Government (Scotland) Act, 1929, 9th Sched.), 30. [7] See 1913 Act, s. 2 (2) (5).
[8] Which takes effect as from 16th May 1930; see s. 80 (2).
[9] Sec. 1. [10] Sec. 18 (3).

of the school boards) under the Mental Deficiency Acts.[1] The Act of 1929 also made provision for the transfer to the town and county councils of property held by the former authorities for the purposes of their statutory functions,[2] and for the transfer of their officers and superannuation funds.[3]

Section 4.—The Care of Lunatics.

Subsection (1).—*Definition of "Lunatic."*

503. The Lunacy (Scotland) Act, 1862, defines "lunatic" for the purposes of the Acts as "every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind." [4] It should be observed that, according to their statutory definitions, "lunatic" and "defective" are not mutually exclusive terms.

Subsection (2).—*Asylums.*

(i) *District Asylums.*

504. The Lunacy (Scotland) Act, 1857, provided for the division of Scotland into eight districts, with a view to, *inter alia*, the erection of asylums for the reception and care of pauper lunatics.[5] A "district asylum" is an asylum, in terms of the Act, of one of these districts. It is the duty of the Board of Control to inquire into the necessities of the districts as regards accommodation for pauper lunatics, and where necessary to require the town or county council (as district board of control) to provide a district asylum.[6] The Board of Control may take steps, where necessary, to secure performance of its directions by the local authority.[7] Provision is made for obtaining plans and estimates for the erection of district asylums or for alterations, for obtaining reports as to eligible sites,[8] for compulsorily acquiring sites,[9] and for disposing of unnecessary sites.[10] District asylums are, by the Local Government (Scotland) Act, 1929, vested in the town or county council, as successor to the District Board of Control.[11]

(ii) *Public Asylums.*

505. The expression "public asylum" includes all such hospitals, madhouses, or asylums as are or shall be established for the custody of lunatics by Act of Parliament or Royal Charter, or under any deed or mortification by which the maker thereof has directed the appropriation of funds to the establishing and maintaining of any lunatic asylum or

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[1] Sec. 3. [2] Sec. 6. [3] Sec. 7. [4] Sec. 1.
[5] Sec. 49. [6] Secs. 51, 52. [7] 1862 Act, s. 9. [8] 1857 Act, s. 51.
[9] 1913 Act, s. 68; 1857 Act, s. 52 (but *N.B.* 1913 Act, s. 68 (6)).
[10] 1862 Act, s. 12; 1913 Act, s. 68 (4).
[11] 1857 Act, s. 53; 1929 Act, s. 6. In the transference of district asylums from the old authority to the new, special provision was made for the case where the functions of the old authority were transferred to two or more new authorities, etc., s. 11 (4).

hospital, or any establishment administering funds for charitable purposes, without any view to any pecuniary gain or profit arising to the establishment or to the estate or funds of the trust or charity, and also all hospitals, madhouses, or asylums, other than district asylums, into which lunatics committed by order and certificate cannot be refused access or reception without special cause shewn.[1] Existing and future public asylums are to be under the supervision of the Board of Control.[2] Plans of public asylums must be submitted to the Board at its request.[3] Power is given to trustees holding funds for the establishment of an asylum to apply the income thereof in payment of assessments; they may also build the asylum, and hand it over to the local authority; and to the extent of the payment made, or the value of the asylum, they obtain relief from assessments.[4] Existing asylums for the use of counties or parishes may be handed over on similar terms.[5] Where one district has a right to accommodation in a public asylum of another district, the second district may buy up that right, and the local authority of the first district must apply the sum received towards obtaining accommodation for pauper lunatics within its own district.[5] Local authorities may arrange with existing asylums for the reception of pauper lunatics.[6] There are special provisions relating to the Crichton Royal Institution at Dumfries.[7]

(iii) *Private Asylums and Houses.*

506. The characteristic which differentiates private asylums from district or public asylums is that the former are kept for the pecuniary profit of the proprietors or superintendents, and admission is a matter of arrangement and can be refused.[8] All private asylums must be licensed by the Board of Control,[9] and plans thereof submitted at the Board's request.[10]

507. Lunatics may also be kept in private houses under an order of the Sheriff.[11] The Board may also grant special licences to the occupiers of private houses for the reception and detention therein of not more than four lunatics.[12] No person may receive or keep a lunatic for gain without the order of the Sheriff or the sanction of the Board.[13] Any person receiving a lunatic into his house must, within fourteen days thereafter, apply for such order or sanction.[13] The Board makes provision for the periodical medical examination of lunatics detained in private houses and for inspection of the houses where they are detained,[14] and for visitation generally.[15] Where the Board deems it necessary, it may apply to the Sheriff for an order to transmit a lunatic detained in a private house to an asylum.[15]

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[1] 1857 Act, s. 3. [2] *Ibid.*, ss. 9, 10. [3] 1913 Act, s. 51. [4] 1857 Act, s. 56.
[5] *Ibid.*, s. 58. [6] *Ibid.*, s. 59; 1862 Act, s. 8; 1887 Act, s. 4.
[7] 1857 Act, s. 60; 1913 Act, s. 41. [8] 1857 Act, s. 3.
[9] *Ibid.*, s. 27; see also ss. 28–30. [10] 1913 Act, s. 51.
[11] 1857 Act, s. 3. [12] 1862 Act, s. 5. [13] 1866 Act, s. 13.
[14] *Ibid.*; s. 13 does not apply where the patient is received for temporary residence only, not exceeding six months, and under a medical certificate. [15] 1913 Act, s. 57.

SUBSECTION (3).—*Reception.*

508. Sec. 14 of the Lunacy (Scotland) Act, 1862, empowers the Sheriff of any county in Scotland to grant an order for the reception into, and detention in, any asylum, lunatic ward of a poorhouse, or licensed house, of any lunatic resident or found within the county; but no such order shall be granted unless upon a petition subscribed by the party applying for the same, accompanied by a statement of full particulars as to the history, condition, and illness of the lunatic, and setting forth the degree of relationship or other capacity in which the petitioner stands to the lunatic, and accompanied by two medical certificates of the mental incapacity of the lunatic. The order of the Sheriff shall be in the form of Schedule E annexed to the Act of 1857. No superintendent of any asylum shall receive or detain any person as a lunatic without such order, except in the case of any lunatic whose case is certified by a medical person to be one of emergency, in which case the lunatic may be detained for three days without an order. But the Board has power to sanction the reception of a pauper lunatic in the lunatic ward of a poorhouse, or of any lunatic, in a house holding a special licence, without the order of the Sheriff.[1] A medical person who signs such a certificate must specify therein the grounds for his opinion that the person to whom the certificate applies is insane, and distinguish in the certificate facts observed by himself from facts communicated by others.[2] Before granting the certificate, he must conduct a personal examination.[3] No lunatic may be received under a certificate which purports to be founded only upon facts communicated by others.[2] The medical attendants of an asylum may not grant certificates for the reception of any lunatic, not a pauper lunatic, into the asylum, except the emergency certificate referred to above.[4] There are penalties imposed for receiving lunatics in unlicensed houses or for receiving them without the necessary order.[5]

509. The superintendent of any asylum may, however, receive a voluntary patient who desires treatment, but is not certifiable as insane, on the patient's written application requesting admission, but such voluntary patient may not be detained more than three days after reception without the consent of one of the Commissioners.[6] He must be produced to the Commissioners on their visitation of the asylum.[6]

SUBSECTION (4).—*Detention.*

510. The Sheriff is entitled to visit and inspect asylums or houses where lunatics are detained.[7] The county council may appoint three of their number to visit and inspect any asylum within the county.[8]

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[1] 1862 Act, ss. 4, 5; see also 1857 Act, s. 39.
[2] 1857 Act, s. 35.
[3] *Ibid.*, s. 38.
[4] 1866 Act, s. 4.
[5] 1857 Act, s. 39.
[6] 1866 Act, s. 15; 1913 Act, s. 59.
[7] 1857 Act, s. 25.
[8] *Ibid.*, s. 26; Local Government (Scotland) Act, 1889, s. 11 (5) (ii).

The Secretary of State for Scotland may also order a special visitation and examination.[1] Provision is made for access to visit a lunatic under detention being given to the minister of the parish and the patient's minister and relatives.[2] The Board of Control, and the superintendent of the asylum, may also give access to any person who can shew satisfactory reasons for visiting a patient.[3] Correspondence passing between patients detained in asylums and the Board, or a Commissioner, or the Sheriff, is to be forwarded to its destination unopened.[4] It is an offence on the part of the asylum officials to maltreat, abuse, or neglect a patient.[5] There are special protections given in the case of female patients.[6] On an application by the Procurator-Fiscal or one of the Commissioners, accompanied by two medical certificates stating that the asylum is unsuitable for the confinement of the lunatic, the Sheriff may order his removal to another asylum or house.[7] The Board of Control may, without an order from the Sheriff, make a similar transfer, on the application of certain relatives of the patient, or (in the case of a pauper lunatic) on the application of an inspector of poor.[8]

Subsection (5).—*Liberation.*

511. Any person procuring two medical certificates, approved by the Sheriff, stating that a lunatic has recovered, and an order from the Sheriff for his liberation, may require the superintendent of the asylum to liberate the patient. The Board may, in like manner, make an order for liberation.[9] Where, however, the lunatic is detained under sentence of a Court of justice, no liberation is competent without the authority of the Court or a warrant from a Secretary of State.[10] A private patient may be discharged on the written request of the person at whose instance he is detained, or, failing him, of certain near relatives.[11] Where it appears safe to liberate a patient, the superintendent of the asylum must grant a certificate to that effect, and transmit a copy thereof to the person at whose instance the lunatic is detained; that person or, failing him, the Board may then take steps to have the patient liberated.[12] On an application presented by certain relatives of the patient or, in the case of a pauper lunatic, by an inspector of poor, the Board may authorise a lunatic to be liberated on probation.[13] Where a patient who considers himself to have been unjustly confined is liberated, he is entitled to receive, free of charge, a copy of the papers relating to his detention.[14] A voluntary patient must be released within three days of having given notice of his desire to leave the asylum, unless he is certified insane and an order for his detention is obtained from the Sheriff.[15]

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[1] 1857 Act, ss. 104, 105.
[2] *Ibid.*, s. 47.
[3] *Ibid.*, s. 48; 1913 Act, s. 61.
[4] 1857 Act, s. 16; 1913 Act, s. 60.
[5] 1857 Act, s. 99.
[6] 1913 Act, ss. 46, 56.
[7] 1857 Act, s. 91.
[8] 1862 Act, s. 16.
[9] 1857 Act, s. 92; 1913 Act, s. 55 (5).
[10] 1857 Act, s. 93.
[11] 1913 Act, s. 55 (3), (4).
[12] 1862 Act, s. 17.
[13] *Ibid.*, s. 16; 1866 Act, s. 8.
[14] 1857 Act, s. 94.
[15] *Ibid.*, s. 15.

SUBSECTION (6).—*Dangerous Lunatics.*

512. Sec. 15 of the Lunacy (Scotland) Act, 1862, provides that where a lunatic has been apprehended, charged with assault or other offence inferring danger to the lieges, or has been found in a state threatening danger to the lieges or offensive to public decency, the Sheriff, upon application by the Procurator-Fiscal, inspector of poor, or other person, accompanied by a medical certificate that the lunatic is in such state, shall commit him to safe custody. After notice in a local newspaper the Sheriff shall then inquire into and take evidence as to the condition of the lunatic, and may commit him to any asylum unless the inspector of poor undertakes to make due arrangements for his safe custody. The Sheriff may also authorise the delivery of the lunatic to any person finding caution for his safe custody. The Sheriff shall also pronounce a judgment finding the amount of expenses connected with such application and procedure, and shall grant decree for the said sum against the parish where the lunatic was found, such parish [1] having recourse against the estate of the lunatic, or his relations, or the parish of settlement. This provision is not limited to pauper lunatics.[2] But if application is made to a Sheriff in respect of a pauper lunatic who has his known settlement in another county, the Sheriff may either follow the above procedure or transmit him to the Sheriff of that county to be dealt with there.[3] The expenses incurred in obtaining a warrant for the apprehension of a dangerous lunatic, and in his subsequent commitment to an asylum, being expenses incurred in the public interest, do not constitute an alimentary debt against the lunatic, and so cannot be made a charge against an alimentary fund held by testamentary trustees for his behoof.[4] In "remote parts of the country" any justice of the peace for the county, on being satisfied by sworn information of the minister or any elder of the parish, or other credible person, that a person is a lunatic in pauper or reduced circumstances, or is a dangerous lunatic, may grant warrant for his transmission in safe custody to the nearest town in which a Sheriff resides.[5]

513. If the liberation of a lunatic (not being a pauper) is desired, and the superintendent of the asylum is of opinion that he is a dangerous lunatic, he shall communicate with the Procurator-Fiscal and meantime detain the lunatic. If so advised, the Procurator-Fiscal shall take proceedings under s. 15 of the Lunacy (Scotland) Act, 1862, to have the lunatic detained; if not so advised, he shall communicate his determination to the superintendent, and the patient shall thereupon be discharged, provided he is otherwise entitled to discharge.[6] The Sheriff may authorise the discharge from any asylum of a person committed as a dangerous lunatic, on two medical certificates approved by the Procurator-Fiscal.[7]

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[1] Now the county or town council; see Local Government (Scotland) Act, 1929, s. 1.
[2] Criminal and Dangerous Lunatics (Scotland) Amendment Act, 1871, s. 8.
[3] 1857 Act, s. 86. [4] *Craig* v. *Ferguson*, 1884, 11 R. 1038. [5] 1857 Act, s. 90.
[6] 1866 Act, s. 12; see also 1913 Act, s. 55 (3). [7] 1866 Act, s. 19.

SUBSECTION (7).—*Criminal Lunatics.*

514. Sec. 87 of the Lunacy (Scotland) Act, 1857, provides that where any person charged under any indictment or criminal libel with the commission of any crime shall be found insane, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear to the jury charged with such indictment or criminal libel to be insane, the Court shall direct a finding to that effect to be recorded, and thereupon such Court shall order the accused to be kept in strict custody, during His Majesty's pleasure.[1] Sec. 88 provides that in all cases where it is given in evidence that the accused was insane at the time of the offence and such accused is acquitted, the jury shall be required to find specially whether the accused was insane at the time of the offence, and to declare whether such accused was acquitted by them on that ground; if they so find and declare, the Court shall order the accused to be kept in strict custody during His Majesty's pleasure.[2] If on any appeal it appears to the Court that the appellant was insane at the time of the offence, the Court may substitute for the jury's verdict a verdict of acquittal on the ground of insanity, and may quash the sentence and order the appellant to be detained during His Majesty's pleasure.[3] His Majesty may afterwards give orders for the safe custody of such insane persons.[4] Any person so ordered to be kept in custody may be detained in the general prison at Perth, even though the order fails to specify Perth or specifies another place of detention, unless the order expressly excludes Perth.[5] Such orders may be renewed and varied from time to time.[6] His Majesty may make an order authorising, on such terms and conditions as the order shall specify, the liberation from custody of any such person. If the conditions of liberation are broken the person may be taken into custody and conveyed to the place where he was detained at the time of his liberation, or to any other place to which he might then have been removed; he thereupon reverts to his former position.[6]

515. If any prisoner, while imprisoned, shall appear to be insane, the Sheriff of the county shall, with the aid of two medical persons, inquire into his condition. If these three persons certify that the prisoner is insane, the Secretary of State may direct his removal to any asylum. Where the prisoner is certified by two medical persons to be sane, the Secretary of State may direct his reconveyance to prison or, if his sentence has expired, his liberation.[7] If at any time within sixty days of the expiration of the sentence of a person confined in the general prison at Perth it is certified by two medical persons that he is insane, and that it is advisable that he should be detained in the lunatic department of Perth prison rather than in a lunatic asylum, the Secretary of State may authorise his detention, after the expiration

[1] See CRIME, Vol. V., paras. 131, 574. [2] *Ibid.*, paras. 132, 579.
[3] Criminal Appeal (Scotland) Act, 1926, s. 3 (3).
[4] 1857 Act, ss. 87, 88; 1862 Act, s. 24.
[5] 1862 Act, s. 20. [6] 1871 Act, s. 2. [7] 1857 Act, s. 89.

of his sentence, during His Majesty's pleasure.[1] Where a prisoner confined in a local prison has become insane he may, even though his sentence is for less than nine months, be removed to Perth general prison.[2] If within fourteen days of the period when a prisoner in Perth general prison would fall to be liberated he is certified to be insane, he may be removed back to the local prison to which he has been committed and may from there be transferred to an asylum.[3]

516. Where it is certified by two medical persons that a prisoner in Perth general prison is insane, but that his insanity is of a kind which can be properly treated in a lunatic asylum, the Secretary of State may order his removal to a district asylum, or to a chartered or licensed asylum in which pauper lunatics are maintained in terms of any contract for such maintenance. The managers of the asylum, unless there is not sufficient accommodation, are bound to receive him, and, until his sentence is expired, the cost of his maintenance is charged in the accounts of Perth general prison.[4] Where a prisoner in a local prison becomes insane, the Sheriff may, on summary application by the prison authorities, order his removal to an asylum, and the cost of his removal and detention till his sentence expires is charged against the assessments for current expenses under the administration of the Prison Board of the county in which the prisoner's offence was committed.[5] The orders of the Secretary of State and Sheriff respectively for the removal of an insane prisoner to an asylum shall not terminate on the expiry of the prisoner's sentence but shall have effect as if they were orders pronounced by the Sheriff under s. 14 of the Lunacy (Scotland) Act, 1862.[6]

Subsection (8).—*The Property of Lunatics.*

517. The property of persons incapable of managing their own affairs is usually protected by the appointment of a *curator bonis* or judicial factor.[7] Where the Board, or the Accountant of the Court of Session, has reason to believe or suspect that the property of a lunatic is not duly protected by being placed under the management of a judicial factor or *curator bonis*, and that the same is not duly applied for his maintenance, the Board or the Accountant of Court, as the case may be, shall report thereon to the Lord Advocate; and the Lord Advocate may, in any case where he is of opinion, either as a result of such report or from his own inquiries or otherwise, that such proceeding is expedient, apply to the Court for the appointment of a judicial factor.[8] The Board's right to make application to the Lord Advocate exists in respect of any person whose property is in its opinion not duly protected owing to his mental incapacity, even though such person is not being detained and taken charge of as a lunatic or defec-

[1] 1862 Act, s. 19. [2] *Ibid.*, s. 22. [3] *Ibid.*, s. 23.
[4] 1871 Act, s. 4; see also 1913 Act, s. 71 (1).
[5] 1871 Act, s. 6; see also 1913 Act, s. 71 (1).
[6] 1913 Act, s. 71 (2); see para. 508. [7] See Judicial Factor, *infra*.
[8] 1857 Act, s. 81, as amended by 1913 Act, s. 62 (2).

tive.[1] Where the Board or the Accountant of Court is informed or has reason to believe or suspect that the property of a lunatic, though under the management of a judicial factor or *curator bonis*, is not applied to his due maintenance, the Board or the Accountant of Court, as the case may be, shall report thereon to the Lord Advocate; and the Lord Advocate may, in any case where he is of opinion, either as a result of such report or from his own inquiries or otherwise, that such proceeding is expedient, apply to the Court for the appointment of a judicial factor.[2] The expenses of such inquiries and applications are chargeable against the property in question.[3]

518. The Board may obtain from the Accountant of Court the names of all persons having judicial factors or *curatores bonis*, and that whether they are or are not certified as lunatics or defectives, together with a statement of their funds, and of the sums allowed for their maintenance, in order to ascertain in what manner they are cared for; and if such treatment is deemed unsatisfactory, the Board may present a summary petition to the Court of Session craving the Court to direct such steps to be taken for the improved treatment of any such lunatic as to the Court shall appear proper.[4] There are special provisions for the case where a lunatic in England or Ireland has personal property in Scotland, or where a lunatic in Scotland has personal property in England or Ireland.[5]

Subsection (9).—*Miscellaneous.*

(i) *Medical Persons.*

519. The term "medical person" used throughout the Lunacy Acts is defined by s. 3 of the Lunacy (Scotland) Act, 1857, but this definition is now obsolete, for by s. 34 of the Medical Act, 1858,[6] "any words importing a person recognised by law as a medical practitioner or member of the medical profession when used in any Act of Parliament shall be construed to mean a person registered under this Act." In every asylum licensed for one hundred patients or more there shall be a medical person resident therein as the medical attendant thereof, and every asylum licensed for more than fifty and less than one hundred persons shall be visited daily by a medical person.[7] No one other than a medical person is entitled to practise, or to be employed, or to grant any certificate under the provisions of the Lunacy Acts; and it is not competent for any medical person who has any interest in any asylum or house for lunatics, or whose father, brother, or son is superintendent of any such asylum or house, to practise, be employed, or grant certificates under the Lunacy Acts.[8] It is not lawful for the medical superintendent, ordinary medical attendant, or assistant medical officer of any asylum

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[1] 1913 Act, s. 62 (1).
[2] 1857 Act, s. 82, as amended by 1913 Act, s. 62 (2).
[3] 1857 Act, s. 83.
[4] 1866 Act, s. 17, as amended by 1913 Act, s. 62 (2).
[5] Lunacy Act, 1890, s. 131.
[6] 21 & 22 Vict. c. 90.
[7] 1857 Act, s. 45.
[8] *Ibid.*, s. 71.

to grant a certificate of insanity for the reception of any lunatic not a pauper lunatic into such asylum, except the certificate of emergency authorised by s. 14 of the Lunacy (Scotland) Act, 1862.[1] In any action at law which may be raised against any medical person in respect of any certificate granted by him under the provisions of the Lunacy Acts, the issue or issues after being adjusted shall be tried, and the amount of damages, if any, assessed by the Lord Ordinary before whom such action depends, without a jury. Such action must be raised within twelve months of the time when the person alleging injury has been liberated from the asylum.[2]

(ii) *Superannuation Allowances to Asylum Officers.*

520. The Asylums Officers Superannuation Act, 1909, makes provision for superannuation allowances to officers and servants employed in public asylums. Under this Act "established" officers and servants employed in asylums are divided into classes.[3] Such officers and servants are, after not less than twenty years' service, and being not less than fifty-five or sixty years of age, or being permanently incapacitated for asylum duties, entitled to a fixed superannuation allowance.[4] If a man who would have been entitled to this allowance dies, a gratuity may be given to his widow or children.[5] Every officer and servant is to have a certain percentage of his salary or emoluments (fixed according to the scale laid down in the Act) deducted and carried to the fund from which the superannuation allowances are to be paid.[6] The allowances are paid by the county or town council, as successor to the District Board of Control. These provisions for superannuation allowances have been extended to apply to the officers and servants of certified institutions for defectives.[7]

Section 5.—The Care of Defectives.

Subsection (1).—*Definition of "Defective."*

521. By s. 1 of the Mental Deficiency and Lunacy (Scotland) Act, 1913, the following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of the Act:—

(*a*) Idiots; that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers;

(*b*) Imbeciles; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so;

(*c*) Feeble-minded persons; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not

[1] 1866 Act, s. 4; see para. 508. [2] 1866 Act, s. 24.
[3] Sec. 1. [4] Sec. 2. [5] Sec. 4. [6] Secs. 8, 9.
[7] Asylums and Certified Institutions (Officers' Pensions) Act, 1918, s. 1.

amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;

(*d*) Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.

SUBSECTION (2).—*Institutions and Certified Houses.*

(i) *State Institutions.*

522. The Secretary of State for Scotland may grant authority to establish and maintain institutions for defectives of dangerous or violent propensities. Such institutions are known as State Institutions, and their management is vested in a joint Board consisting of the Prison Commissioners and two of the paid Commissioners of the Board of Control, subject to regulations made by the Secretary of State.[1]

(ii) *Certified Institutions.*

523. The Board of Control may, upon application by the managers of premises intended for the reception, control, care, and treatment of defectives, if satisfied as to the fitness of the premises and of the persons proposing to maintain them, grant a certificate to the managers to receive defectives therein. This certificate continues in force till revoked or resigned. Such premises are known as certified institutions.[2] Any institution for the care and training of imbecile children, which was, before the Act of 1913, licensed under s. 7 of the Lunacy (Scotland) Act, 1862, became without certification a certified institution, unless and in so far as upon the application of the managers it may be certified under the Act of 1913.[3] The managers of an institution (not being a certified institution provided for the district by a District Board of Control [4]) shall not be bound to receive any defective whom they have not expressed their willingness to receive.[5]

(iii) *Certified Houses.*

524. A certified house is a house certified by the Board of Control to receive defectives, but kept for private profit. Any person desirous of receiving defectives at his house for private profit may apply to the Board for a certificate, and the Board, if satisfied of the fitness of the premises and of the applicant, may, if it thinks fit, on payment of a fee not exceeding £10, grant a certificate subject to conditions prescribed by regulations made by the Board. The certificate remains in force till revoked or resigned. A defective ordered to be sent to an institution

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[1] 1913 Act, s. 28. [2] *Ibid.*, s. 29 (1). [3] *Ibid.*, s. 29 (2).
[4] After 16th May 1930, the county or town council. [5] 1913 Act, s. 29 (3).

may be sent to a certified house, and the provisions relating to institutions for defectives and the patients therein shall, unless the contrary intention appears, apply to certified houses and the patients therein.[1]

SUBSECTION (3).—*Powers of Dealing with Defectives.*

(i) *Defectives Supported by Relatives.*

525. It is the duty of the parents or guardians of defective children between five and sixteen years of age, who are able to do so, to provide for their education, proper care, and supervision.[2] If a child is idiot or imbecile, his parent or guardian may place him in an institution, or certified house or under guardianship, upon two medical certificates and with the consent of the Board of Control.[3] If he is not idiot nor imbecile, but a defective under twenty-one years of age, his parent [4] may do likewise.[5] An alternative method of procedure is for any relative or person contributing to the support of the defective to apply to the Sheriff for an order authorising the placing of the defective in an institution or certified house or under guardianship.[6]

(ii) *Defectives Supported at the Public Expense.*

526. The responsibility for such defectives is, by the Local Government (Scotland) Act, 1929, placed in the hands of a new authority, viz. the town or county council.[7] Formerly where, by reason of the attendant expense, a parent or guardian was unable to make suitable provision for a defective child between five and sixteen years of age, it was generally the duty of the education authority to make provision for the education, proper care, and supervision of the child.[8] Where such a defective child between five and sixteen years of age was mentally incapable of receiving instruction, the burden of making suitable provision was transferred to the parish council.[9] It was also the duty of the parish council to take steps that all defectives over sixteen years of age, who were not subject to be dealt with by their parents or guardians, should be placed in institutions or certified houses or under guardianship.[10] Further, where a defective was found neglected, abandoned, or without visible means of support, or cruelly treated, or fell under certain other specified categories, he was liable to be dealt with by the education authority or parish council, as the case might be.[11] By virtue of the Local Government (Scotland) Act, 1929, these functions of the education authority and parish council are transferred to certain town and county councils.[12]

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[1] 1913 Act, s. 39; subject to certain limitations, see provisos to s. 39 (2).
[2] 1913 Act, s. 2 (1). [3] *Ibid.*, ss. 4 (1); 39 (2). [4] *N.B.*, but not his guardian.
[5] 1913 Act, ss. 4 (1), 39 (2). [6] *Ibid.*, ss. 6, 7, 39 (2). [7] See para. 502, *supra.*
[8] 1913 Act, ss. 2 (1) (2), 3 (1) (*b*) (2); see *School Board of Glasgow* v. *Parish Council of Glasgow*, 1916 S.C. 26.
[9] 1913 Act, ss. 2 (2) (*b*) (4) (5), 3 (1) (*b*). [10] *Ibid.*, s. 2 (5).
[11] *Ibid.*, s. 3 (1) (*c*); *New Monkland Parish Council* v. *Erskine*, 1926 S.C. 835.
[12] 1929 Act, ss. 1, 3.

SUBSECTION (4).—*Detention under Judicial Order.*

527. Any relative or person contributing to the support of a defective, or the local authority concerned, or, in certain instances, the Procurator-Fiscal or Board of Control, may petition the Sheriff for a judicial order for the detention of the defective.[1] If after the necessary procedure [2] the Sheriff is satisfied that the person to whom the petition relates is a defective, and subject to be dealt with under the Act of 1913, he may order him to be sent to an institution or appoint a suitable person as his guardian.[3] The order must state the class of defectives to which he belongs and the circumstances which render him liable to be dealt with under the Act.[3] Where the order is for the appointment of a guardian, the Board of Control may, in certain circumstances, order the defective to be sent to an institution.[4] In certain circumstances also the Board may remove a guardian and, where the office is vacated by death, resignation, or removal, appoint a new guardian.[5] Provision is made for the execution of judicial orders.[6] These orders usually expire at the end of a year from their date.[7]

SUBSECTION (5).—*Offences Relating to Defectives.*

528. It is an offence to supply intoxicants to a defective contrary to warning.[8] It is also an offence to assist a defective to escape from his place of detention.[9] Where a defective escapes, the person in charge of him may exercise the powers of a constable in regard to his arrest and return.[10] An offence is committed by any officer or employee in an institution or certified house or by any guardian who illtreats a defective.[11] Female defectives are specially protected from the commission against them of sexual offences, and s. 10 of the Criminal Law Amendment Act, 1885, applies to them in the same manner as it does to females under sixteen years of age.[12] It is also an offence to breach any regulations made under the Mental Deficiency and Lunacy (Scotland) Act, 1913.[13]

SUBSECTION (6).—*Criminal Defectives.*

529. Procedure dealing with the trial of criminal defectives is contained in s. 9 of the Mental Deficiency and Lunacy (Scotland) Act, 1913, and the Act of Adjournal of 2nd February 1921. In the case of certain offences proved against any person, or in the case of certain others proved against children, the Court may, if it is of opinion that the person or child is a defective, adjourn the proceedings and report the case to the local authority concerned or the Procurator-Fiscal with a view to the presentation of a petition by them or him for a judicial order authorising the accused to be placed in an institution.[14] This

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[1] 1913 Act, s. 6. [2] Which is set forth in ss. 6, 7. [3] 1913 Act, s. 7 (4).
[4] *Ibid.*, s. 8 (1). [5] *Ibid.*, s. 8 (2). [6] *Ibid.*, s. 11. [7] *Ibid.*, s. 12.
[8] *Ibid.*, s. 43. [9] *Ibid.*, s. 44. [10] *Ibid.*, s. 48. [11] *Ibid.*, s. 45.
[12] *Ibid.*, s. 46. [13] *Ibid.*, s. 47. [14] *Ibid.*, s. 9 (1).

procedure does not apply to a case in which the accused pleads guilty.[1] The Court may arrange for the defective's detention during the adjournment.[2] In such cases it is the duty of the prosecutor to bring before the Court such evidence as may be available of the accused's mental condition.[3] The accused is not debarred, however, from himself raising the question of his mental condition and leading evidence thereon, provided he has given to the prosecutor due notice of his intention. In any trial where the case is reported to the Procurator-Fiscal, he must report to the Court *quam primum* the result of the proceedings on the petition.[4] If at the adjourned diet the judge is satisfied on the report that a judicial order has been made, he may discharge the diet against the accused *simpliciter*.[5] If on the other hand he is satisfied that the judicial order has been refused, he may proceed in respect of the verdict of the jury recorded at the former diet to find the accused guilty and sentence him.[6] Thus where a Sheriff-Substitute, to whom a petition for a judicial order had duly been presented, found that the accused was a defective and a fit subject for detention, but refused to make the order in respect that there was no certified institution available for his detention, the presiding judge, to whom the case was reported by the Procurator-Fiscal, held that it was his own duty to find the accused guilty and sentence him.[7]

530. Mental deficiency cannot be pleaded in bar of trial. Where a person accused of any of the above offences intends at his trial to maintain that he is a defective and should be dealt with under the provisions of the Act of 1913, he must give notice of his intention to do so within seven days of the warrant committing him (if he is committed to prison until liberated in due course of law) or within seven days from his liberation on bail (if he is admitted to bail without being committed to prison).[8] The notice so given must be signed by the accused and must specify to which of the four statutory classes of defectives the accused belongs.[9] It must also be accompanied by a list of witnesses whom the accused proposes to examine to prove that he is a defective, though the Court may, at its discretion, permit other witnesses to be examined.[10] These provisions as to notice do not apply to summary prosecutions.[11] Nothing therein contained is to prejudice the accused's right to lead competent evidence on his mental condition for any purpose other than the application of the Act of 1913.[12] Where the Secretary of State for Scotland is satisfied, upon two medical certificates, that a person undergoing a sentence of imprisonment, penal servitude, etc., is a defective, he may order him to be transferred to an institution for defectives.[13]

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[1] *H.M. Adv.* v. *Breen*, 1921 J.C. 30.
[2] 1913 Act, s. 9 (2).
[3] *Ibid.*, s. 9 (3).
[4] Act of Adjournal, 2nd February 1921, Art. II.
[5] *Ibid.*, Art. III.
[6] *Ibid.*, Art. IV.
[7] *H.M. Adv.* v. *Gordon*, 1921 J.C. 67.
[8] Act of Adjournal, *supra*, Art. I. (i).
[9] *Ibid.*, Art. I. (ii).
[10] *Ibid.*, Art. I. (iii).
[11] *Ibid.*, Art. I. (iv).
[12] *Ibid.*, Art. I. (v).
[13] 1913 Act, s. 10.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION OF GOODS.

See SALE.

INSTALMENT.

See PAYMENT, SALE.

INSTITUTE.

See SUCCESSION.

INSTRUMENT.
INSTRUMENTARY WITNESS.

See DEEDS (EXECUTION OF).

INSUCKEN MULTURES.

See THIRLAGE.

INSURANCE.

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PART I.—ACCIDENT INSURANCE.

SECTION 1.—DEFINITION.

531. Accident insurance business is by statute [1] defined as the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease or sickness, or any class of personal accidents, disease, or sickness.

532. A policy of insurance against accidents as usually drawn is not a contract of indemnity.[2] Such policies accordingly will not entitle the insurers to deduct from the amount due under the policy the amount recovered by the insured from the wrongdoer where the accident has been caused by the wrongful act of a third party; nor are the insurers on paying the claim under the policy subrogated to the rights of the insured against the wrongdoer.[3] The wrongdoer cannot have the amount recovered by the insured from the insurers deducted from the damages which he has to pay.[4]

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[1] Assurance Companies Act, 1909 (9 Edw. VII. c. 49), s. 1 (*c*).

[2] *Theobald* v. *Railway Passengers Assurance Co.*, 1854, 10 Ex. 45, per Alderson B. at p. 53.

[3] 27 & 28 Vict. c. 125, s. 35. See the judgments in *Bradburn* v. *Great Western Rly. Co.*, 1874, L.R. 10 Ex. 1.

[4] *Bradburn, supra;* but see *Liverpool Plate Glass Insurance Co.* v. *Pelletier*, 1883, 75 L.T. Journ. 304.

Section 2.—Indemnity Accident Policies.

533. Another form of accident policy is of the nature of a contract of indemnity, and to that extent it is governed by the same principles as fire or marine insurance. The insurer undertakes to indemnify the assured against any legal liability he may incur in respect of accidental injuries to third parties for which the insured is legally responsible. Examples of such policies are those issued to employers of labour to cover their liability for injuries to persons in their employment, and those issued to the owners of vehicles to cover their liability to persons injured by accidents in which their vehicles may be involved. An insurance policy under which an insurance company agrees to pay for or on behalf of employers, such sums as they should become liable to pay under the Employers Liability Act, the Workmen's Compensation Acts, or at Common Law, in respect of personal injury to any workman in their employment is not a "policy of insurance against accident within the meaning of the Stamp Act, 1891." [1]

534. The principle of contribution as applied in marine and fire insurance also applies to the classes of policy above referred to as contracts of indemnity.[2] In such policies the contingency insured against not being injury or death by accident, but a claim for compensation against the assured, questions relating to the meaning of the term "accident" are not involved in the same way as under an ordinary accident policy. Liability depends upon whether a claim for compensation is made out at common law or under statute. Where under the policy there is a limitation of the amount recoverable in respect of an accident it should be made clear whether the accident refers to an occurrence which may result in injury to a number of persons or to the injury to each individual. In one case a tramway company was insured against "claims for personal injury in respect of accidents caused by vehicles . . . to the amount of £250 in respect of any one accident." By the overturning of a tramway car belonging to the company, forty persons were injured. It was held that the limitation to the sum of £250 "in respect of any one accident" applied to injury by accident to any one individual, and not to the whole injuries sustained in one accident to the vehicle.[3]

Section 3.—Accident Insurance Proper.

535. In contracts of this nature the most important questions relate to the determination of the risk as defined in the policies; and this question is dealt with in this article. Policies of insurance under which the insured is guaranteed indemnity in the event of his being found

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[1] *Lancashire Insurance Co.* v. *Inland Revenue Commrs.*, [1898] 1 Q.B. 353.

[2] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977, per Lord Low at p. 980.

[3] *South Staffordshire Tramways Co.* v. *The Sickness and Accident Assurance Association*, [1891] 1 Q.B. 402.

liable in respect of injury to or death of third parties by accident are not dealt with. Although there is a very large business in the latter the question of liability under them depends, as a rule, upon the issue of an action between the injured party or his representatives and the insured, and not upon a construction of the terms of the policy. Accordingly any established rules based upon decisions in such actions will be dealt with under the appropriate headings.

Section 4.—The Proposal.

536. The proposal for accident insurance is practically the same as that for a life policy, and the same duty rests upon the proposer to make a full disclosure of all facts within his knowledge which affect the risk. The most material of these facts, in the case of an accident policy, are those relating to the occupation of the proposer,[1] his physical condition, and his habits. Sometimes questions are asked as to the earnings of the proposer, as it is not thought desirable to insure for more, in the case of disablement, than the insured would make if in health. Companies also place the same importance as in other forms of insurance upon the fact that applications for insurance have been made to other offices, and have been accepted or refused. The law relating to the representations in the proposal, and to concealment of facts affecting the risk, is the same in the case of accident as of life insurance.[2] The utmost degree of good faith is required from an assured in effecting a policy of insurance. If he conceals anything that he knows to be material, it is a fraud; but, in addition, if he fails to disclose anything that may influence the rate of premium which the insurers may require, although he does not know that it would have that effect, such non-disclosure renders the policy voidable.[3]

Section 5.—Insurable Interest.

537. Accident policies are usually own-life policies, but there is nothing to prevent anyone insuring the life of another against accident if he has an insurable interest in that life. Accident policies have been held to be subject in this respect to the provision of the Life Assurance Act, 1774,[4] as regards insurable interest.[5]

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[1] *Equitable Life Assurance Society* v. *General Accident Assurance Corporation*, 1904, 12 S.L.T. 348.

[2] *Life Assurance of Scotland* v. *Foster*, 1873, 11 M. 351; *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363; *Jones* v. *The Provincial Insurance Co.*, 1857, 3 C.B. (N.S.) 65; *Fowkes* v. *The Manchester and London Life Assurance and Loan Association*, 1863, 3 B. & S. 917; *Anderson* v. *Fitzgerald*, 1853, 4 H.L.C. 484; *Bawden* v. *The London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Cruickshank* v. *Northern Accident Assurance Co.*, 1895, 23 R. 147.

[3] Lord Blackburn in *Brownlie* v. *Campbell*, 1880, 7 R. (H.L.) 66, at p. 82; 5 App. Cas. 925, at p. 954; *Macdonald* v. *The Law Union Fire and Life Insurance Co.*, 1874, L.R. 9 Q.B. 328; *Maynard* v. *Rhode*, 1824, 5 Dow & R. 266; *Duckett* v. *Williams*, 1833, 3 L.J. (N.S.) Ex. 141.

[4] 4 Geo. III. c. 48.

[5] *Shilling* v. *The Accidental Death Insurance Co.*, 1857, 26 L.J. Ex. 266.

Section 6.—Conditions as to Payment of Premiums.

538. Accident policies usually contain conditions similar to those in life policies as to the payment of first premiums and the commencement of the risk.[1] Accident policies are, as a rule, annual contracts, and are renewable at the end of one year, in this respect resembling contracts of insurance against fire. The obligation to pay the sums insured, after the first period of insurance has expired, is accordingly expressly made conditional on the payment of renewal premiums within a specified period thereafter, "so long as the company shall accept the same." Under this provision, unless it is qualified by other parts of the policy, or by statements in the prospectus or advertisements of the company, an accident which happens within the days of grace before the renewal premium has been accepted is not covered by the insurance.[2]

Section 7.—Definition of the Risk.

539. In an accident policy the liability of the insurers is usually expressed to be for injuries caused by "violent, accidental, external, and visible means," and the proper legal construction of these words has been frequently the subject of discussion. In a recent case the term "visible" was held equivalent to "external," and to point to the intervention of any physical agency external to the person of the assured. "External" was itself held to mean the antithesis of internal, so that any injury not arising from internal weakness or disease is external.[3] The violence of the means can in general only be inferred from the nature of the injury, and therefore the term "violent" adds nothing to the other terms of the definition.

540. The term "accidental" is the crucial term of the definition, and accordingly it has more than once been defined judicially, but generally with the reservation that a definition of universal application could not be given. Certain rules of construction have, however, been laid down. The first is that what is caused by natural disease or internal weakness is not accident. Thus, where the assured was an officer on board a ship trading in the tropics, and was killed by sunstroke, it was held that this was not an accident.[4] A similar decision was given where after exertion, not of an abnormal character, death due to weak internal organs ensued.[5] A second rule is that the term "accidental" cannot be applied to means which are the ordinary, or a usual, result of a voluntary act by the assured himself; but that if the result which follows from the

[1] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 978.

[2] *Simpson* v. *The Accidental Death Insurance Co.*, 1857, 2 C.B. (N.S.) 257.

[3] *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q.B. 750; *Burridge & Son* v. *Haines & Sons, Ltd.*, 1918, 87 L.J. K.B. 641; *Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I.R. 1.

[4] *Sinclair* v. *The Maritime Passengers Assurance Co.*, 1861, 30 L.J. Q.B. 77.

[5] *In re Scarr and the General Accident Assurance Corporation*, [1905] 1 K.B. 387; *Clidero* v. *Scottish Accident Assurance Co.*, 1892, 19 R. 355.

voluntary act is one which was not intended and was highly unusual and improbable, then the injury may be said to have resulted from accidental means.[1] When the question is one between suicide and accident, suicide is not to be presumed;[2] and when the assured has died in the water, it is not necessary to prove by direct evidence that he died by drowning, or to exclude the possibility of death by cramp or apoplexy, or some internal disease. It is sufficient that the death happened in such a way as naturally to point to accident; and not necessary to negative the possibility that it happened from other causes that might be suggested.[3]

Section 8.—Conditions Limiting the Risk.

541. In addition to the clause in the body of the policy defining the risk, there are usually conditions attached to the policy, intended to impose further limitations upon the insurer's liability. A common form of such condition is one which excepts from the risk injury or death caused by internal disease. This merely expresses affirmatively what is implied in the term "accident," and it therefore adds nothing to the operative words of the policy. Where the question arises it is always "whether, according to the ordinary meaning of language, it was the accident that killed the insured."[4] A second form of condition is intended to except from the risk cases where internal disease, arising or existing independently of the accident, is either the sole cause of death or injury, or contributes to the death or injury jointly with the accident. This provision is intended to avoid the necessity of investigation as to the true cause of death where accident and natural disease are both present, and where it is doubtful which has been the cause of death or disability. A third form of condition declares that the policy shall not apply where the accident itself gives rise to one or other of certain enumerated diseases, such as erysipelas or hernia, where that disease is the direct cause of death. Another form of condition excepts injuries sustained while the insured is in a state of intoxication, or during somnambulism, or while insensible, or in a fit. Where a policy excepted from the risks covered accidents to the insured "whilst . . . wilfully, wantonly, or negligently exposing himself to any unnecessary danger," and the insured, who was an expert swimmer, was drowned while bathing alone from a boat in a Highland loch on an evening in the end of April it was held that a claim under the policy was not excluded by the circumstances in which the insured met his death.[5]

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[1] *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q.B. 750; *Burridge & Son* v. *F. H. Haines & Sons, Ltd.*, 1918, 87 L.J. K.B. 641; *Theobald* v. *The Railway Passengers Assurance Co.*, 1854, 10 Ex. 45. Compare *Cole* v. *The Accident Insurance Co., Ltd.*, 1889, 61 L.T. 227.

[2] *Macdonald* v. *Refuge Assurance Co.*, 1890, 17 R. 955; *Mallory* v. *Travellers Insurance Co.*, 1871, 7 Am. Rep. 410; *Harvey* v. *Ocean Accident and Guarantee Corporation*, [1905] 2 I.R. 1.

[3] *Macdonald* v. *Refuge Assurance Co., supra.*

[4] *Hope's Trs.* v. *The Scottish Accident Insurance Co.*, 1896, 3 S.L.T. 252.

[5] *Sangster's Trs.* v. *General Accident Assurance Corporation*, 1896, 24 R. 56.

542. In dealing with a claim upon a policy containing such conditions, the Court in endeavouring to ascertain what was the cause of death or injury will have strict regard to the words of the policy. In certain cases the cause proximate in point of time has been held to be the cause of the accident even though other contributing causes were present. This rule is illustrated by cases which have been decided in England.[1] But in other cases the cause proximate in point of time has not been regarded as the effective cause. Thus in a case where the insurance was against "death from the effects of injury caused by accident" and the accident brought about a state of circumstances in which the insured was rendered peculiarly liable to cold and caught a cold from the effect of which he died in less than one month of the accident, the Court held that the executors were entitled to the amount in the policy held by the deceased.[2] On the other hand, where the insurance was against accident, with an exception of "death arising from . . . hernia, erysipelas . . . arising within the system of the assured, before or at the time of or following" the injury ("whether causing such death directly or jointly with the accidental injury"), and death took place from erysipelas some days after an accident, the insurers were found not liable.[3] Under a policy against accidental death, in which death directly or indirectly due to the War was excepted, it was held that the death of the insured, which was caused by his being knocked down by a train while visiting sentries at night, came under the exception.[4] In an action upon an accident policy which excepted liability in the case of death or of disablement by accident caused (*inter alia*) "by medical or surgical treatment, or fighting, ballooning, racing, self-injury, or suicide, or anything swallowed or administered or inhaled," it was held that the context was not sufficient to confine the exception to voluntary inhalation, and that a death resulting from involuntary inhalation of coal gas was within the exception.[5] In the case of *M'Kechnie's Trs.*,[6] the policy contained an exception from the risk in the case of death or injury from internal disease, although accelerated by accident. Lord Fraser held the exception to apply where the assured, both before and after the accident, was afflicted with Bright's disease, and where he died from that disease accelerated by an accidental fall from his dog-cart. The Second Division adhered, but on the ground that, apart from the terms of the

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[1] *Winspear* v. *Accident Insurance Co.*, 1880, 6 Q.B.D. 42; *Lawrence* v. *Accidental Insurance Co.*, 1881, 7 Q.B.D. 216. Compare *Reynolds* v. *Accidental Insurance Co.*, 1870, 22 L.T. N.S. 820.

[2] *Isitt* v. *The Railway Passengers Assurance Co.*, 1889, 22 Q.B.D. 504.

[3] *Smith* v. *Accidental Insurance Co.*, 1870, L.R. 5 Ex. 302. Compare *Fitton* v. *The Accidental Death Insurance Co.*, 1864, 17 C.B. (N.S.) 122, which was distinguished; see also *Mardorf* v. *Accident Insurance Co.*, [1903] 1 K.B. 584; *Hope's Trs.* v. *Scottish Accident Insurance Co.* (O.H.), 1896, 3 S.L.T. 252; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591.

[4] *Coxe* v. *Employers Liability Insurance Corporation*, [1916] 2 K.B. 629.

[5] *In re United London and Scottish Insurance Co., Ltd.*, [1915] 2 Ch. 167.

[6] *M'Kechnie's Trs.* v. *Scottish Accident Insurance Co.*, 1889, 17 R. 6.

proviso altogether, it had not been proved that the assured died from accident.

543. In considering a clause excepting accidents to the insured while "under the influence of intoxicating liquor," it was held to be unnecessary to decide whether the insured was drunk, it being sufficient to protect the insurers if the insured was shewn to be the worse of drink at the time of the accident.[1] In another case where there was a similar exception clause it was held that it was not necessary for the insurers to prove that the insured was under the influence of drink not only when he was injured but also at his death, it being held sufficient if it was proved that he was under the influence of intoxicating liquor at the time of the accident from which his death resulted.[2]

544. Sometimes the exceptions from the risks insured against include accidents happening "by exposure of the insured to obvious risk of injury." Under the terms of a policy insuring against accidental death or injury this form of exception to the risks insured against occurred. The insured was killed by a train while crossing a main line of railway in broad daylight. On a claim being made under the policy it was rejected and the exception clause was held to have the effect of excluding the two following classes of accident: (1) Accidents which arose from the assured exposing himself to risk of injury, which risk was obvious to him at the time; and (2) accidents which arose from the assured exposing himself to risk of injury, which risk would have been obvious to him if he had paid reasonable attention to what he was doing.[3]

Section 9.—Disablement.

545. As to the construction of the words "wholly disabled from following his usual occupation, business, or pursuits," reference may be made to the case undernoted.[4]

Section 10.—Notice of Accident.

546. Most policies contain provisions requiring notice of the accident within a specified number of days. When such notice is made by the terms of the policy a condition precedent, no claim upon the policy is in general maintainable unless it has been complied with.[5] But unless this notice is made a condition precedent to liability under the policy, the Court will not hold delay fatal to a claim, but merely mulct the claimant in the expenses, if any, occasioned by the delay.[6] In order, however, that such a condition may operate as a condition precedent,

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[1] *Macrobbie* v. *The Accident Assurance Co.*, 1886, 23 S.L.R. 391.

[2] *Mair* v. *Railway Passengers Assurance Co.*, 1877, 37 L.T. (N.S.) 356.

[3] *Cornish* v. *The Accident Assurance Co.*, 1889, 23 Q.B.D. 456.

[4] *Hooper* v. *Accidental Death Insurance Co.*, 1860, 5 H. & N. 546.

[5] *Patton* v. *Employers Liability Assurance Co.*, 1887, 20 L.R. Ir. 93; *Cassel* v. *The Lancashire and Yorkshire Insurance Co.*, 1885, 1 T.L.R. 495; *Cawley* v. *The National Employers' Accident and General Assurance Association*, 1885, 1 T.L.R. 255.

[6] *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.*, 1887, 35 W.R. 716, at p. 717.

it must appear clearly from the terms of the policy that this was intended to be its effect. Otherwise the notice will not be regarded as essential to the right of the assured or his representatives to sue upon the policy.[1] In the case of *Shiells* the facts were very special. The insurance was against injury or death by accident to a horse. The horse was so injured by an accidental fall that it became necessary to kill it. Notice was sent to an agent of the company, on the footing that the case was one of death and not of injury. On receipt of this notice the company at once repudiated liability, on the ground that the horse had been killed without their sanction, and that the notice should have complied with the conditions applicable to the case of injury. The Court held that the case was properly treated by the assured as one of death, and that the notice given was sufficient. It was also held that, after the company had repudiated liability, it was not incumbent on the insured to send in a report by a veterinary surgeon, or take any further steps required by the policy as preliminaries to a claim.[2] The construction of a condition as to notice in a re-insurance policy was considered in a recent case.[3] The words "as soon as possible" were held to mean as soon as possible having regard to all existing circumstances, including the available means of knowledge of the insured's personal representative of the existence of the policy and the identity of the insurance company.[4]

PART II.—FIDELITY INSURANCE.

Section 1.—Definition.

547. Fidelity insurance, as the term usually is employed, is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of honesty, integrity, or fidelity of employees or persons holding positions of trust.

548. Enquiry regarding the nature of the contract is more a matter of theoretical interest than of practical importance except as regards the mode of proof of the contract. In the United States of America, where this branch of law has received more judicial consideration than it has in this country, the following view has been expressed: "While the agreement in form may resemble a contract of suretyship, it is in substance and effect a contract of insurance and the general principles governing the older forms of insurance, such as fire, marine, and life, are applicable to this more modern form of insurance." Another authority states that "whatever the form of the contract, it is well established that guaranteeing the fidelity of employees is a form of insurance, although it also partakes somewhat of the nature of suretyship." [5]

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[1] *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.*, 1887, 35 W.R. 716, at p. 717.

[2] *Shiells* v. *Scottish Assurance Corporation*, 1889, 16 R. 1014.

[3] *British General Insurance Co.* v. *Mountain*, 1919, 36 T.L.R. (H.L.) 171.

[4] *Verelst's Administratrix* v. *Motor Union Insurance Co.*, [1925] 2 K.B. 137.

[5] American Cyclopedia of Law and Procedure, xix. 516.

Section 2.—Form of Contract.

549. The older form of the contract is a bond bearing an *ad valorem* stamp, but now the more common form is an agreement or policy bearing a sixpenny stamp. In England whether a contract is one of ordinary guarantee or a contract of insurance it falls within the fourth section of the Statute of Frauds and must be in writing. In Scotland there appear to be divergent views as to whether a contract of insurance must be in writing.[1] If the contract be one of suretyship or cautionary it can only be proved by writ.[2]

Section 3.—Construction of Contract.

550. The rules of construction applicable to other policies of insurance apply, and in particular the rule that a policy is to be most strongly construed against the insurer.[3] But this rule of construction must not be carried to an extreme; it "cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon." [4]

Section 4.—Scope of Contract.

551. The losses which are covered by the policy depend on the terms thereof fairly construed. Generally the loss insured against is one due to dishonesty, and in such cases a loss due to negligence is not covered. Where an employer was insured against "larceny or embezzlement" by an employee it was held to be unnecessary for the employer to prove against him the crime of larceny or embezzlement as defined by the laws of the State.[5] As a rule the policy does not cover losses from acts of dishonesty prior to its date,[6] but the terms of the policy may be sufficiently wide to cover prior acts of dishonesty.[7] A policy usually covers only losses incurred during a definite period, but where no term is mentioned the obligation is a continuing one, and the insurer is bound until he intimates his withdrawal from the obligation or until the service terminates.[8] Expenses of recovering property misappropriated

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[1] *M'Elroy* v. *London Assurance*, 1897, 24 R. 287, per Lord M'Laren at p. 290; but see *Christie* v. *North British Insurance Co.*, 1825, 3 S. 519, per Lord Justice-Clerk at p. 522; *Parker* v. *Western Assurance Co.*, 1925, S.L.T. 131.

[2] Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), s. 6; per Lord Blackburn in *Walker's Trs.* v. *M'Kinlay*, 1880, 7 R. (H.L.) 85, at p. 89.

[3] *Life Association of Scotland* v. *Foster*, 1873, 11 M. 351, per Lord Ardmillan at p. 371; *Anderson* v. *Fitzgerald*, 1853, 4 H.L.C. 484, per Lord St. Leonards at p. 507.

[4] *Guarantee Co. of North America* v. *Mechanics Savings Bank and Trust Co.*, 1902, 183 U.S. 402, at p. 419.

[5] *Champion Ice, etc., Co.* v. *American Bonding and Trust Co.*, 1903, 103 Am. St. Rep. 356.

[6] *Smith* v. *Bank of Scotland*, 1829, 7 S. 244, per Lord Justice-Clerk at p. 250.

[7] *Wallace's Factor* v. *M'Kessock*, 1898, 25 R. 642.

[8] *Nicolsons* v. *Burt*, 1882, 10 R. 121; see also *Phillips* v. *Foxall*, 1872, L.R. 7 Q.B. 666.

by an employee have been deducted from the value of the property recovered before giving the guarantor of the employee's honesty credit for the balance.[1]

Section 5.—Concealment.

552. Where a company carries on the business of granting fidelity bonds or policies to employers in respect of their employees the relationship is, as a rule, that of insurer and assured, and the employer must disclose any knowledge he has respecting any previous defalcation on the part of the employee.[2] Guarantee policies are contracts *uberrimæ fidei*. The party taking the guarantee is bound to inform the guarantor of any facts from which it might be inferred that the party whose trustworthiness is guaranteed is unworthy of trust.[3] So also the creditor must disclose to the cautioner any facts which are within his knowledge regarding the honesty and trustworthiness of the person whose conduct is guaranteed.[4] Where the concealment is by the employee, of facts outwith the knowledge of the insured, the policy is not vitiated.[5]

553. After the fidelity policy has been issued and during its currency it is the duty of the assured to give notice to the insurer of any breach of duty committed by the employee which would entitle the insured to dismiss the employee, even although the conduct of the employee has not been such as to ground a claim under the policy.[6] If the assured does not give notice the insurer is discharged from liability. If the assured does give notice the insurer may call upon the assured to dismiss the employee, and if the assured refuses or neglects to do so the insurer is freed from liability under the policy.[7] Fidelity policies sometimes contain a clause requiring the assured to give notice of any breach of duty by the employee during the currency of the policy, and the extent of the obligation to do so depends upon the terms of the clause. The equitable obligation above stated exists independently of any express terms in the contract.[8] This principle, however, does not appear to apply to a case where the policy is issued in favour of a public official who has no power to dismiss the servants whose fidelity is insured.[9]

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[1] *Hatch, Mansfield & Co., Ltd.* v. *Weingott*, 1906, 22 T.L.R. 366.

[2] *Seaton* v. *Heath*, [1899] 1 Q.B. 782.

[3] *Smith* v. *Bank of Scotland*, 1829, 7 S. 244; *Railton* v. *Matthews*, 1844, 3 Bell's App. 56, per Lord Campbell at p. 68; *French* v. *Cameron*, 1893, 20 R. 966; *Aitken & Co.* v. *Pyper*, 1900, 38 S.L.R. 74.

[4] *Leith Bank* v. *Bell*, 1830, 8 S. 721, affd. 1831, 5 W. & S. 703; *Thomson* v. *Bank of Scotland*, 1824, 2 Sh. App. 316; *Thistle Friendly Society of Aberdeen* v. *Garden*, 1834, 12 S. 745; *Snaddon* v. *London, Edinburgh, and Glasgow Assurance Co.*, 1902, 5 F. 182.

[5] *Wallace's Factor* v. *M'Kissock*, 1898, 25 R. 642, at pp. 649 and 650.

[6] *Phillips* v. *Foxall*, 1872, L.R. 7 Q.B. 666; *Sanderson* v. *Aston*, 1873, L.R. 8 Ex. 73; *Burgess* v. *Eve*, 1872, L.R. 13 Eq. 450.

[7] *Aetna Indemnity* v. *Crowe*, 1907, 154 Fed. Rep. 545. [8] *Phillips* v. *Foxall*, *supra*.

[9] *Lawder* v. *Lawder*, 1873, I.R. 7 C.L. 57; *Byrone* v. *Muzio*, 1881, 8 L.R. Ir. 396, at p. 412.

Section 6.—Representation.

554. "A representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. The representation must be material in order, if untrue, to render the contract voidable.[1] It is now settled that innocent misrepresentation is sufficient ground for rescinding a contract, provided (1) that the contract has not been completely executed,[2] (2) that there can be *restitutio in integrum*,[3] and (3) that the misrepresentation induced or helped to induce the other party to contract. The question whether a proposal has been declined by any other office is a material one, and must be truly answered by an intending assured, otherwise the policy granted to him will be voidable.[4]

Section 7.—Condition or Warranty.

555. Conditions or warranties, as distinguished from representations, or statements which induce the making of a contract, are terms of the completed contract itself. Where there is a provision in the policy that the statements of the insured or employee shall be warranties or shall be part of the contract, or shall be the basis of the contract, representations by the applicant become conditions or warranties, and if untrue, whether or not material, they avoid the contract.[5] The law with regard to warranty as applied to contracts of insurance is the same in Scotland as in England.[6] "As warranties must be literally fulfilled, the Courts have always manifested a strong indisposition to regard any statement made by the insured as a warranty, unless such was the obvious purpose of the parties." [7] The matter warranted need not be material to the risk. Further, a breach of warranty discharges the insurer notwithstanding that any loss which may arise has no connection with the breach or that the breach has been subsequently remedied. In the United States there is a tendency to treat warranties in the same way as representations. Thus, where a bank warranted that the employee was not now or about to be engaged in other business or employment than the bank's service, it was held that this referred only to some business or employment calculated to interfere with the employee's duty to the bank, or to increase the risk, and therefore that the policy was not avoided by the employee's engagement in other work before or after banking hours.[8]

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[1] *The* "*Bedouin*," [1894] P. 1, per Lord Esher at p. 12 ; but see *Gordon* v. *Street*, [1899] 2 Q.B. 641, at p. 646.

[2] *Seddon* v. *North-Eastern Salt Co.*, [1905] 1 Ch. 326.

[3] *Boyd & Forrest* v. *Glasgow and South-Western Rly. Co.*, 1915 S.C. (H.L.) 20.

[4] *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363.

[5] *Dawsons Ltd.* v. *Bonnin*, 1922 S.C. (H.L.) 156.

[6] *Thomson* v. *Weems*, 1884, 11 R. (H.L.) 48, per Lord Watson at p. 53.

[7] Note to *First National Bank* v. *Fidelity and Guarantee Co.*, 1902, 100 Am. St. Rep. at p. 780 ; *Thomson, supra.*

[8] *American Bonding Co.* v. *Morrow*, 1906, 117 Am. St. Rep. 72.

556. A few of the more common conditions inserted or implied in policies of fidelity insurance may be noted. (1) It is an implied condition that the insured shall not change the duties or remuneration of the employee, and such change discharges the insurer's liability unless the bond or policy in terms permits the change.[1] (2) It is an implied and often expressed condition that the insured shall give notice to the insurer of acts of dishonesty by the employee within a reasonable time after such acts come to his knowledge. Failure to do so frees the insurer from liability.[2] (3) A condition is sometimes inserted to the effect that the insured shall aid in prosecuting the defaulting employee to conviction. And where it was made a condition precedent to the right to recover "that the employer shall . . . use all diligence in prosecuting the employed to conviction for any fraud or dishonesty," and the employer refused to prosecute, it was held that he could not recover.[3] (4) It is an implied condition that the employer shall use reasonable precautions to guard against fraud, and sometimes it is expressly stipulated that specified precautions shall be taken. If reasonable precautions or the stipulated precautions are not taken, the insurer is freed from liability.[4]

Section 8.—Subrogation.

557. An insurance company issuing policies in which its position is that of a cautioner is entitled to be subrogated to the party whose rights have been insured in the event of the principal debtor defaulting.[5] The principle of subrogation also applies in the case where an insured after receiving payment of the policy recovers a sum from a third party who caused the loss. In this case the insured must account to the insurers for the sum recovered.[6] The insured cannot after a loss has occurred defeat the insurer's right of subrogation by any gratuitous discharge of his claims against third parties. Should he do so he must give credit to the insurer for the value of the claim he has abandoned.[7]

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[1] *Wembley Urban District Council* v. *The Poor Law and Local Government Officers Mutual Guarantee Association*, 1901, 17 T.L.R. 516 ; *Bonar* v. *M'Donald*, 1850, 7 Bell's App. 379 ; *The North-Western Rly. Co.* v. *Whinray*, 1854, 10 Ex. 77.

[2] *Snaddon* v. *London, Edinburgh, and Glasgow Assurance Co.*, 1902, 5 F. 182 ; *Phillips* v. *Foxall*, 1872, L.R. 7 Q.B. 666.

[3] *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911.

[4] *Leith Banking Co.* v. *Bell*, 1831, 5 W. & S. 703 ; *Dundee and Newcastle Steam Shipping Co.* v. *The National Guarantee and Surety Association*, 1881, 18 S.L.R. 685 ; *Haworth & Co.* v. *Sickness and Accident Assurance Association*, 1891, 18 R. 563.

[5] *Dane* v. *The Mortgage Insurance Corporation*, [1894] 1 Q.B. 54 ; *Laird* v. *Securities Insurance Co.*, 1895, 22 R. 452.

[6] *Darrell* v. *Tibbits*, 1880, 5 Q.B.D. 560 ; *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380.

[7] *West of Scotland Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q.B. 226 ; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753.

PART III.—FIRE INSURANCE.

Section 1.—General Principles.

Subsection (1).—*Indemnity.*

558. Fire insurance is a contract of indemnity by which the insurer undertakes upon the terms and conditions in the policy to indemnify the insured for loss or damage by fire. To sustain a loss the insured must have an interest in the property destroyed, and the value of that interest at the time of the loss is the measure of the amount which can legally be secured by a fire policy.[1] That interest need not necessarily subsist at the time when the policy is taken out.[2]

Subsection (2).—*Insurable Interest.*

559. It is not every interest in property which the law recognises as insurable. An expectation of benefit or advantage from the preservation of property, although it amounts to a moral certainty, does not itself give an insurable interest, unless it is coupled with a legal right. Thus, an heir, unless under an entail, has no insurable interest, although he may be heir-at-law to an ancestor incapable of making a will; and, generally, an interest which is contingent, and not founded upon an existing right under contract or otherwise, is not insurable.[3] On the other hand, the mere fact that an interest, vested in the insured at the time of the loss, is defeasible or arises from a contract subject to a resolutive condition, does not affect the validity of the insurance.[4] Within the limits specified it will be seen that, in addition to the right of property in a subject, any right incidental to ownership, such as a right to rents, or profits, or any subsidiary right arising from contract, will constitute an insurable interest. Although rents or business profits during non-occupancy, while the premises injured by fire are under repair, may be insured by a policy expressly including them, they are not covered by a policy in general terms on the premises.[5]

560. Where there are separate interests in the same subjects, each party may insure independently of the others, and the presumption is that his insurance is for his own benefit alone. Thus a vendee has no claim upon the proceeds of a policy effected by the vendor before the loss,[6] or a mortgagee upon the policy effected by the mortgagor, although

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[1] *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 386; *Glasgow Provident Investment Society* v. *Westminster Fire Office*, 1887, 14 R. 947, at p. 965; *Simpson* v. *Thomson*, 1877, 3 App. Cas. 279, at p. 284.

[2] *Williams* v. *Baltic Insurance Association of London*, [1924] 2 K.B. 282.

[3] *Lucena* v. *Craufurd*, 1806, 2 Bos. & P. (N.R.) 269, per Chambre J. at p. 299; Lawrence J. at p. 306; Lord Eldon at p. 324; *Stockdale* v. *Dunlop*, 1840, 6 M. & W. 224.

[4] *Columbian Insurance Co.* v. *Lawrence*, 1829, 2 Peters (U.S.) 25; 8 Curtis 10.

[5] *Menzies* v. *North British and Mercantile Insurance Co.*, 1847, 9 D. 694; following *In re Wright and Pole*, 1834, 1 A. & E. 621; *Glasgow Provident Insurance Society* v. *Westminster Fire Office*, 1888, 13 App. Cas. 699.

[6] *Rayner* v. *Preston*, 1880, 14 Ch. D. 297; 1881, 18 Ch. D. 1.

the latter is under covenant to insure,[1] or a lessee in the lessor's insurance.[2] The same rule holds in the case of liferenter and fiar,[3] and in the case of prior and postponed bondholders.[4] If the lessee is under covenant to repair, and is thus liable to restore premises destroyed by accidental fire, the lessor is still entitled to effect insurance on his own account to cover the double contingency of a loss by fire and of the lessee's insolvency.[5]

561. If a transfer under a contract of sale is complete, the vendor's policy comes to an end, and the vendee acquires the interest; but if the property has not passed to the vendee, and if the subject is not at his risk, a mere expectation of profit to arise from the subsequent performance of the contract is not covered by a policy on the goods.[6] But if the risk has passed, although the property may still be in the vendor, the vendee has an interest.[7] If the vendor retains under the contract a right of retention or a lien for the purchase money unpaid, an insurance effected before the transfer is still available to this extent, subject to the equitable assignment to his insurer of the vendor's personal claim against the vendee.[8] In the case of the sale of a heritable subject, the contract of sale, by missives or otherwise, usually precedes the conveyance of the subjects, and the entry to possession by the vendee; and in England it is settled that if, in the interval, the subject is damaged by fire, the vendee is not entitled to any abatement from the price.[9] The practice in Scotland (where the point has not been expressly decided) is to obtain a transfer of the policy to the purchaser upon the completion of the missives on the footing that the property is then at his risk.

562. A shareholder has no insurable interest as such in the property of a limited liability company even if he owns all the shares. The property is not his but that of the company, which is a separate *persona*.[10] Nor has a creditor an insurable interest in the property of his debtor unless he is in possession of it or has actually some form of security over it. All that an unsecured creditor has is at most an expectation of benefit in the debtor's property if the latter is not lost.[10]

563. An insurable interest may in certain circumstances be acquired in a fiduciary character. Thus a trustee who holds the legal title to the property has an insurable interest, and may insure in his own name for the beneficiaries.[11] In certain other cases an insurance in his own name by one of the parties interested has been held to be for the joint

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[1] *Whiteley* v. *Lees*, 1866, L.R. 2 Eq. 143. [2] *Leeds* v. *Cheetham*, 1827, 1 Sim. 146.

[3] *Warwicker* v. *Bretnall*, 1883, 23 Ch. D. 188; *Pollok, Petr.*, 1889, 26 S.L.R. 515.

[4] *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.*, 1883, 11 R. 287; *Godin* v. *London Assurance*, 1758, 1 Burr. 492.

[5] *Andrews* v. *Patriotic Insurance Co. of Ireland*, 1886, 18 L.R. Ir. 355.

[6] *Anderson* v. *Morice*, 1876, 10 C.P. 58, 609; 1876, 1 App. Cas. 713, at p. 723.

[7] *Martineau* v. *Kitching*, 1872, L.R. 7 Q.B. 436.

[8] *Rayner* v. *Preston*, 1881, 18 Ch. D. 1.

[9] *Rayner, supra*; *Paine* v. *Meller*, 1801, 6 Ves. 349; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753. [10] *Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619.

[11] *Lucena* v. *Craufurd*, 1806, 2 Bos. & P. (N.R.) 269, per Lord Eldon at p. 324; *Ebsworth* v. *Alliance Insurance Co.*, 1873, L.R. 8 C.P. 596, per Brett J. at p. 638.

benefit where, first, this was the intention in effecting the policy, and, second, the terms of the policy were such as to cover the joint interest, or where the insurers voluntarily paid the whole damage.[1] Thus where the policy covers "goods held in trust or on commission" by a bailee, it has been decided that the insured may recover, as trustee for the owners, the value of goods intrusted to him for carriage, custody, or otherwise, which may have been destroyed by fire.[2] When the policy is issued in the above terms the bailee is entitled to apply the sum recovered to the satisfaction, in the first instance, of his own loss, including his loss of charges or commission on customers' goods, holding the residue merely, if any, as trustee for his customers.[3] This form of policy is now rarely issued, and only to persons who are actual custodians of the goods. Such a policy is now usually expressed to be upon "goods the insured's own, or held in trust or on commission, for which he is responsible." The insurance is in this case a reinsurance of the carrier's or warehouseman's liability at common law, or under his contract of carriage or bailment. The words "for which he is responsible" are held to govern the whole clause, and to confine the insurance to goods for the safety of which the bailee is legally liable.[4]

Subsection (3).—*Assignability.*

564. A policy of fire insurance issued to a person named cannot be assigned upon a transfer of the property without the insurer's consent.[5] An assignation of the subject-matter therefore does not of itself operate as an assignment of the policy so as to substitute the assignee for the original assured and to enable him to enforce it in his own name. Upon the bankruptcy of the assured the subject-matter of the insurance vests in his trustee in bankruptcy.[6] In the case of marine policies the clause which extends the insurance to "all to whom the property does or may appertain in part or in all," has, by mercantile usage, the effect of making the policy assignable; but in the case of fire policies there is no such clause, and the scope of the insurance is therefore limited to the interest of the persons named.[6]

Subsection (4).—*Subrogation.*

565. The position of an insurer is not that of a cautioner; his liability is a primary, not a secondary, liability. An insurer is accordingly not

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[1] *Irving* v. *Richardson*, 1831, 2 B. & Ad. 193, 196; *Gillespie* v. *Miller, Son & Co.*, 1874, 1 R. 423, at p. 433; *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, at p. 398.

[2] *Cochran & Son* v. *Leckie's Tr.*, 1906, 8 F. 975; *Waters* v. *Monarch Insurance Co.*, 1856, 5 El. & Bl. 870; *London and North-Western Rly. Co.* v. *Glyn*, 1859, 1 El. & El. 652; see also *Lake* v. *Simmons*, [1927] A.C. 487 (as to meaning of words "entrusted to a customer").

[3] *Dalgleish* v. *Buchanan*, 1854, 16 D. 332.

[4] *North British and Mercantile Insurance Co.* v. *Moffatt*, 1871, L.R. 7 C.P. 25; *Engel* v. *Lancashire and General Assurance Co.*, 1925, 41 T.L.R. 408.

[5] *Lynch* v. *Dalzell*, 1729, 4 Bro. P.C. 431; *Sadlers' Co.* v. *Badcock*, 1743, 2 Atk. 554; *Hunt* v. *Springfield Fire Insurance Co.*, 1904, 196 U.S. 47.

[6] *Collingridge* v. *Royal Exchange Assurance Corporation*, 1877, 3 Q.B.D. 173; *Dickenson* v. *Jardine*, 1868, L.R. 3 C.P. 639.

entitled to require the insured to exhaust his remedies against third parties liable for the loss before making a claim upon his policy. Thus, if a mortgagee insures independently of the mortgagor, and the security is destroyed, he is entitled to be indemnified by his insurers for this loss up to the amount of his debt, and is not bound first to enforce his debtor's personal obligation.[1] The primary liability thus imposed upon an insurer is subject to his right of subrogation, in virtue of which, and as a corollary from the principle of indemnity, the insurer, who pays as for a total loss, is entitled to the benefit of all the means open to the insured by which that loss may be diminished.[2] The principle applies in all cases where a third party is liable to make good the loss as well as the insurer; and it is immaterial whether the liability of such third party arises from contract, or rests upon delict or negligence.[3]

566. There are, however, certain limitations upon the right of subrogation. For instance, while the insured is not entitled, after a loss has occurred, to release his claims against third parties gratuitously, and so defeat the insurer's claim to an assignment,[4] there is no restraint upon freedom of contract before the loss; and the insured may enter into contracts in regard to the subject insured which may cut off the insurer's right of subrogation. Thus if, before the loss, a seller agrees with the purchaser to deduct from the price any sum he may recover under an existing policy, the insurers will have no right of subrogation.[5] In other words, the insurer's right to enforce relief against third parties is commensurate with that of the insured. In the case supposed, the purchaser might plead the agreement against an action for the price by the insured, and he is therefore entitled to plead it against the insurers, who sue as assignees merely of the insured.[6] Nor is the insured in general bound, in effecting an insurance, to disclose the existence of agreements with third parties which affect the insurer's right of recourse, unless they are made the subject of special inquiry, or where the insured is otherwise made aware that the premium is calculated upon the hypothesis that the insurer will be entitled to an assignment on payment.[7] A second limitation to the right of subrogation arises when the purchaser, or other third party primarily liable for the loss, is insolvent. The

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[1] *Re Birkbeck Permanent Benefit Building Society*, [1913] 2 Ch. 34; *Jackson* v. *Forster*, 1860, 1 El. & El. 470.

[2] *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380; *Darrell* v. *Tibbits*, 1880, 5 Q.B.D. 560; *Burnand* v. *Rodocanachi*, 1882, 7 App. Cas. 333, at p. 339; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753.

[3] *Quebec Fire Assurance Co.* v. *St. Louis*, 1851, 7 Moo. P.C. 286, at p. 316; *Mason* v. *Sainsbury*, 1782, 3 Doug. 61; *Clark* v. *Blything*, 1823, 2 B. & C. 254.

[4] *Commercial Union Assurance Co.* v. *Lister*, 1874, L.R. 9 Ch. 483; *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q.B. 226; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753.

[5] *Nichols & Co.* v. *Scottish Union and National Insurance Co.*, 1885, 14 R. (App.) 1094; *Nelson* v. *Bound Brook Mutual Fire Insurance Co.*, 1887, 3 Am. St. Rep. 308.

[6] See *Simpson* v. *Thomson*, 1877, 3 App. Cas. 279.

[7] *Tate* v. *Hyslop*, 1885, 15 Q.B.D. 368, at p. 375; *Phœnix Assurance Co.* v. *Fire, etc., Co.*, 1885, 117 U.S. 312, at p. 326.

insurer's right of recourse is then of no value; but this fact does not constitute a valid defence to an action by the insured upon the policy.[1]

SUBSECTION (5).—*Contributions—Several Insurances.*

567. The doctrine of contribution is also a corollary from the principle of indemnity. The right to contribution, although usually provided for by a condition of the policy, exists apart from special stipulation, wherever there are two or more insurances covering the same interest in the same property, the aggregate amount insured being greater than the loss by fire.[2] The insurers then contribute rateably to the loss in the proportion of the total sums insured by the different policies. The doctrine of contribution is not applicable unless the same interest is covered by the two policies. If separate interests in the same subject are insured, the insurers, as regards their liability *inter se*, stand in the place of the parties they have insured, so that if one of the parties is primarily liable for the loss in a question with the other, his insurer must make good the whole loss. Thus, if a carrier or warehouseman, primarily liable for the safety of goods in his custody, insures to cover this risk by a policy on goods "for which he is responsible," and the owner also insures, there is no double insurance, and no contribution. The interests covered by the one policy depend on a risk or liability for the safety of the goods, arising either at common law or under contract. In the case of the owner the interest is the ordinary interest arising from ownership, which is not affected by the fact that the owner may have other remedies by which to make good a loss besides that afforded by his policy.[3] This decision was followed in the case of separate insurances by prior and postponed bondholders,[4] and in the case of separate insurances by lessor and lessee.[5] In neither of these cases was the interest covered by the two policies the same, and accordingly the Court held there was no room for the application of the principle of contribution. On the other hand, as has been pointed out above, a bailee's policy may be effected in such terms as to cover the interest of the owner of the goods in his custody, and not merely the bailee's interest or responsibility; and where this is the case, and if the owner also insures, there will be double insurance as regards the owner's interest, and the insurers will contribute rateably to his indemnification.[6]

568. Again, contribution will be applicable if both lessor and lessee are insured, and if one of the policies is, in terms of a covenant to insure

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[1] *Andrews* v. *Patriotic Assurance Co. of Ireland*, 1886, 18 L.R. Ir. 355.

[2] *North British and Mercantile Insurance Co.* v. *London and Liverpool Insurance Co.*, 1877, 5 Ch. D. 569, per James L.J. at p. 581.

[3] *North British and Mercantile Insurance Co., supra.*

[4] *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.*, 1883, 11 R. 287 ; see also *Godin* v. *London Assurance*, 1758, 1 Burr. 492.

[5] *Andrews* v. *Patriotic Assurance Co. of Ireland*, 1886, 18 L.R. Ir. 355.

[6] *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 1876, 93 U.S. 527.

in the lease or otherwise, effected for the joint benefit;[1] and similarly in the case of mortgagor and mortgagee, if the mortgagor's policy is effected by arrangement with the mortgagee to cover the joint interest.[2] Thus contribution may be pleaded by the insurers under one policy, when another policy, although not in the name of the party to the first, covers his interest along with that of others, but not in the case where, although upon the same subjects, the second policy is exclusively intended, or only, by its terms, available for the party in whose name it is issued.

569. The policies must all be in force at the time of the loss in order that contribution should apply, and there must not be in any of the policies a condition limiting the right of contribution.[3]

570. Although contribution is not pleadable where prior and postponed bondholders independently insure the security, payment under one policy may yet indirectly effect liability under the others. Thus, on the principle of indemnity, it would be a defence to a claim by postponed bondholders against their insurers, that by payments of insurance money to prior bondholders the preferable debt upon the security had been reduced to the same extent as the value of the security had been diminished by the fire. This defence was maintained by insurers of postponed bondholders in the case undernoted,[4] and it is thought that its validity could not have been questioned had the Court been prepared to accept as the measure of the damage by fire the amount required to reinstate the subjects. The amount required to reinstate had been paid by different insurers to the prior bondholders, who had applied it in reduction of their debt, and the premises were not reinstated. It further appeared from the admissions and the proof in the case that, taking into account the reduction in the debt effected by the payment to the prior bondholders, the salvage of the subjects, estimated at their market value, did not cover the postponed bonds and the balance of prior bonds, whereas before the fire the value was sufficient to cover all the bonds. The question in the case really became what method of estimating a fire loss was to be adopted; and the decision was that, in dealing with such interests, the proper method was to estimate the loss, not by the amount required to reinstate, but by the difference in saleable value of the subjects before and after the fire.[5] In this view the rule above referred to formed no bar to the recovery of the sum claimed by the postponed bondholders (as loss to the security itself), since, when added to that already paid to the prior bondholders, the aggregate did not exceed the loss by fire. The final result of the case would seem to be to establish the following propositions: (1) A

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[1] *Reynard* v. *Arnold*, 1875, L.R. 10 Ch. 386.

[2] *Nichols & Co.* v. *Scottish Union and National Insurance Co.*, 1885, 14 R. (App.) 1094; see also *Garden* v. *Ingram*, 1852, 23 L.J. Ch. 478.

[3] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977; Welford and Otter Barry, Fire Insurance, 2nd ed., p. 367.

[4] *Glasgow Provident Investment Society* v. *Westminster Fire Office*, 1887, 14 R. 947; 15 R. (H.L.) 89; 13 App. Cas. 699.

[5] See para. 613, *infra*.

mortgagee or other encumbrancer has an insurable interest in the security notwithstanding the existence of prior encumbrances, provided the aggregate amount of the encumbrances is not greater than the value of the security; (2) a subsequent encumbrancer insuring his interest will have a right to recover in the event of a loss where the security is so reduced in value as to leave his debt wholly or partly uncovered after the prior bonds have been paid off, either by insurance or out of the salvage; (3) in estimating this reduced value for the purpose of such an insurance, the market value of the site and salvage of buildings is to be taken, and not the value for the purposes of reinstatement, which is in general much greater; (4) insurance by creditors of their independent interests is not to be treated as double insurance by the owner, in respect that he is made a party to each of the creditors' policies for his reversionary interest.

Section 2.—Constitution of the Contract.

Subsection (1).—*Proposal and Acceptance.*

571. A contract of insurance against fire may be constituted by writing or by parole.[1] But where a newspaper insurance scheme denies any contractual liability there is no indemnity, no contract of insurance;[2] and where a verbal contract is averred, the printed conditions in the company's ordinary policies will not be imported.[3] There is no statutory provision, as in marine insurance, requiring the contract to be embodied in a stamped policy, although a penalty is imposed upon any person who receives a premium for an insurance against fire, and who does not within a specified period thereafter issue a policy duly stamped. The stamp is 6d.,[4] and there is no provision against after-stamping.[5]

572. In order to constitute a valid insurance, whether by parole or by informal writings, the essential elements of the contract—the subject insured, the risk, and the premium—must be determined.[6] Thus, if a proposal is accepted on the understanding that the premium is to be the same as that charged by another company upon the risk, there is no insurance till the premium has been fixed by that company.[7] But a policy containing an unusual term, unknown to the proposer at the time of the contract, may be rejected.[8]

573. Where a proposal is accepted by a company upon the condition that the insurance shall not begin until the premium is paid, they are not bound to issue a policy or make good a loss, if before the

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[1] *Christie* v. *North British Insurance Co.*, 1825, 3 S. 519; *Relief Fire Insurance Co.* v. *Shaw*, 1876, 94 U.S. 574.

[2] *Woods* v. *Co-operative Insurance Society*, 1924 S.C. 692.

[3] *Parker & Co. (Sandbank)* v. *Western Assurance Co.*, 1925, W.C. & Ins. Rep. 82.

[4] Finance Act, 1920 (10 & 11 Geo. V. c. 18), s. 40.

[5] *Thompson* v. *Adams*, 1889, 23 Q.B.D. 361; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100.

[6] *Strohn* v. *Hartford Fire Insurance Co.*, 1875, 19 Am. Rep. 777.

[7] *Christie* v. *North British Insurance Co.*, 1825, 3 S. 519.

[8] *Star Fire and Burglary Insurance Co.* v. *Davidson*, 1903, 5 F. 83.

premium is tendered the risk has terminated or has materially altered.[1] And where the agent of an insurance company contracts with A., the agent of B., to insure B.'s goods, and causes a policy to be issued in the name of A. in the intention that B should be directly insured, the company is estopped from denying liability.[2] In general, when the policy or other writing embodying the contract has not been delivered, the onus is upon the party alleging a contract of insurance to shew that the premium has been paid, or that credit has been given for it.[3] Credit is held to have been given for the premium when the policy or an interim receipt is issued to the insured without requiring payment;[4] and in a case in the Supreme Court of the United States it was held, in view of the practice of the company, that a proposal and acceptance by correspondence constituted a completed contract, although the premium was not paid before the loss.[5] An offer by a company to insure on specified terms cannot be revoked after the applicant has posted an acceptance of the offer.[6]

Subsection (2).—*Covering Notes.*

574. Where an application is made for insurance, it is the practice of most companies to issue interim covering notes, by which the property is protected until the company have determined whether to accept or decline the risk. The covering note sets forth the heads of the proposed insurance, and is made subject to the usual terms and conditions of the company's policies applicable to the class of risk. It acknowledges receipt of the premium, or of a deposit on account of premium where the rate is not finally fixed, and declares the subjects insured until the policy is delivered, or notice given that the proposal is declined. A covering note need not be stamped provided that the policy is issued duly stamped within one month as required by the Stamp Act, 1891.[7] The period of endurance of the covering note is usually limited to a month, and it is provided that on the termination of the insurance by the expiry of this period, or by refusal notified to the insured, the part of the premium unearned shall be returned. A covering note thus corresponds to a "slip" in marine insurance, except that there is no statutory provision which prevents the former from operating as a valid contract. Thus a slip for fire insurance undertaken by Lloyds is valid.[8]

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[1] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977; *Canning* v. *Farquhar*, 1886, 16 Q.B.D. 727.

[2] *Hough* v. *Guardian Fire and Life Assurance Co.*, 1892, 18 T.L.R. 273; and see *Cochran & Son* v. *Leckie's Tr.*, 1906, 8 F. 975.

[3] *M'Elroy* v. *London Assurance Corporation*, 1897, 24 R. 287.

[4] *Kelly* v. *London and Staffordshire Fire Insurance Co.*, 1883, 1 C. & E. 47.

[5] *Eames* v. *Home Insurance Co.*, 1876, 94 U.S. 621.

[6] *Taylor* v. *Merchants Fire Insurance Co.*, 1849 (U.S.), 9 Howard 390; 18 Curtis 191; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

[7] Welford and Otter Barry, Fire Insurance, 2nd ed., p. 107.

[8] *Thompson* v. *Adams*, 1889, 23 Q.B.D. 361; see also *Bhugwandass* v. *Netherlands Insurance Co.*, 1888, 14 App. Cas. 83.

575. When the usual conditions of the company's policies are incorporated by reference into the interim note, it will be invalidated by a breach on the part of the insured of one of these conditions, although he may not have been aware of the condition in question.[1] On the other hand, it has been held in favour of the insured, that even in the absence of express provision, an interim agreement for insurance is to be construed with reference to the proved usage of the company, and as entitling the insured to a policy in the common form issued by the company.[2]

SUBSECTION (3).—*Contract entered into by Agent.*

576. An insurance entered into with an agent of a company is only valid when it is proved that the agent was authorised to bind the company.[3] Such authority may either be proved as expressly contained in the agent's instructions, or as inferred from a course of practice acquiesced in by the company. If such a course of practice is proved, it is immaterial what were the private instructions issued to the agent: it is sufficient if his act fell within the apparent scope of his authority.[4] It is not the practice for British companies to authorise their agents to issue policies or conclude a final contract of insurance;[5] but in some cases instructions to local agents authorise them to conclude interim insurances. In this case an interim note granted by the agent will bind the company till it is repudiated by them or by the insured.[6]

577. When an agent is authorised to effect insurances on behalf of the company, he must, in order to bind the company, do so in the way prescribed in his instructions, unless a contrary practice acquiesced in by the company is proved. Thus an agent who is authorised to conclude contracts on behalf of the company in writing, and subject to the premium being paid, is not entitled to conclude contracts by parole, or to give credit for the premium, and if he does so, will not bind the company;[7] but where there is implied authority the agent will bind the company.[8] If no method of payment is prescribed, an agent may accept a cheque in payment of the premium, there being funds in bank to meet it. The payment then dates from the receipt of the cheque.[9] An insurance made by one person on behalf of another without authority cannot be ratified by the party on whose behalf it is made after and with knowledge of the loss of the thing insured.[10]

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[1] *Queen Insurance Co. of Canada* v. *Parsons*, 1881, 7 App. Cas. 96.
[2] *Browning* v. *Provincial Insurance Co. of Canada*, 1873, 5 P.C. 263, at p. 273; *De Grove* v. *Metropolitan Insurance Co.*, 1875, 19 Am. Rep. 305.
[3] *M'Elroy* v. *London Assurance Corporation*, 1897, 24 R. 287.
[4] *Montreal Assurance Co.* v. *MacGillivray*, 1859, 13 Moo. P.C. 87, 119–124.
[5] *Linford* v. *Provincial Horse and Cattle Insurance Co.*, 1864, 34 Beav. 291.
[6] *Mackie* v. *European Assurance Co.*, 1869, 21 L.T.N.S. 102.
[7] *Montreal Assurance Co.* v. *MacGillivray*, 1859, 13 Moo. P.C. 87.
[8] *Murfitt* v. *Royal Insurance Co.*, 1922, 38 T.L.R. 334.
[9] *Taylor* v. *Merchants Fire Insurance Co.*, 1849 (U.S.), 9 Howard 390; 18 Curtis 191.
[10] *Grover & Grover* v. *Mathews*, [1910] 2 K.B. 401.

SUBSECTION (4).—*The Policy.*

578. The policy is the usual and proper form in which a contract of insurance is expressed. The following is a typical form of policy, which conveniently sets forth the usual clauses and exceptions:—

> Whereas A. B. (hereinafter called the insured) having paid to the X. Y. Company (hereinafter called the company) the sum of £ , being the premium for insuring against loss or damage by fire, the property hereinafter described in the several sums following, viz.:—(*Here follows the description of the various items insured, and the sums appropriated to each item*), the company hereby agrees with the insured (but subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the property above described or any part thereof shall be destroyed or damaged by fire between the day of 19 , and the day of 19 , both inclusive, or at any time afterwards so long as the insured, or his representatives in interest, shall pay to the company, and it shall accept the sum required for the renewal of this policy on or before the day of in each succeeding year, the company will out of its Capital, Stock and Funds pay or make good all such loss or damage to an amount not exceeding in respect of the several matters above specified the sum set opposite thereto respectively and not exceeding in the whole the sum of £ .—In witness whereof, this policy has been signed on the day of 19 .

579. The conditions upon the back of the policy vary slightly in the case of different offices. The more important deal with the questions of misrepresentation, excepted risks, and adjustment of the loss, including contribution, and are noticed under these heads. The policy is to be construed with reference to the principle of indemnity, and it is thus not the damage or loss to the property described that the insurers undertake to make good, but the loss or damage to the interest of the insured in the property; and the same rule applies to the construction of the contribution clause.[1] It is a rule of construction, that if the conditions are ambiguous and admit of interpretation they are to be read in the sense most favourable to the insured, the instrument being prepared by the company.[2]

580. Policies are usually for a year, and the terminal days are included in the period. This rule, which is expressed in the form of policy given above, was held to apply where the insurance was "from the 14th day of February 1868 until the 14th day of August 1868," and it was held that the company were liable for a loss which occurred

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[1] *Andrews* v. *Patriotic Assurance Co. of Ireland*, 1886, 18 L.R. Ir. 355, per Pallas C.B.

[2] *Fowkes* v. *Manchester and London Assurance Association*, 1863, 3 B. & S. 917, 925; *National Bank* v. *Hartford Insurance Co.*, 1877, 95 U.S. 673.

upon the 14th August.[1] Where the length of policy is not mentioned, but merely its two terminal dates, normally this will mean inclusive of both these dates. Thus where a ship was insured from 20th September to noon 20th February and sank on 20th September, it was held that this was within the period covered.[2] Where it was provided that a risk was to commence "from issuance," it was held that the risk commenced not from the time the policy was executed by the insurance company, but when it was delivered to insured.[3]

581. In some cases fifteen days of grace are allowed for payment of the premium, but apart from express provision this does not mean that the insurance extends for that period. The insured cannot recover for a loss within the fifteen days unless the renewal premium has been paid before the loss, and he thus derives no benefit from the concession.[4] When the policy is renewed, the insured should communicate to the company any change in the structure or use of the subjects affecting the risk, or apply for a reinspection of the premises and a revision of the description in the policy, otherwise the policy may be challenged on the ground of concealment or misrepresentation of material facts. The rule seems to follow from the consideration that both parties, having an option to renew, are in substantially the same position as if they were entering into a new contract.

582. The condition in the policy, that the company will pay the loss "out of its Capital, Stock and Funds," excludes personal liability on the part of the members or shareholders of the company. If the funds prove insufficient, the insured has no recourse against the shareholders.[5]

583. Where a policy acknowledging receipt of the premium is prepared in terms of a proposal for insurance, and bears to be "signed, sealed, and delivered," it is complete and binding against the insurers although it remains in their possession, and although the premium has not been paid.[6]

Section 3.—Representations and Warranties.

Subsection (1).—*Materiality.*

584. A contract of insurance is made upon the implied condition that all material facts have been disclosed. If there has been any misrepresentation or concealment of material facts known to either of the parties, although without fraudulent intention, the policy is voidable at the instance of the other. The criterion of materiality which is

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[1] *Isaacs* v. *Royal Insurance Co.*, 1870, 5 Exch. 296; *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q.B. 402; and see *Sheffield Corporation* v. *Sheffield Electric Light Co.*, [1898] 1 Ch. 203, at p. 209.

[2] *Scottish Metropolitan Assurance Co.* v. *Stewart*, 1923, 39 T.L.R. 407.

[3] *Allis Chalmers Co.* v. *Fidelity and Deposit Co.*, 1916, 114 L.T. (H.L.) 443.

[4] *Tarleton* v. *Staniforth*, 1796, 5 T.R. 695; but see *Salvin* v. *James*, 1805, 6 East 571.

[5] *Lethbridge* v. *Adams*, 1872, L.R. 13 Eq. 547.

[6] *Xenos* v. *Wickham*, 1866, 2 L.R. (H.L.) 296.

equally applicable to all kinds of insurance, is whether the fact is one which would usually be regarded in the business of insurance as material. The proper question is whether the risk would have been accepted at all, or would have been accepted on the terms offered, if the truth had been known, taking as a standard the ordinary principles and methods of insurers in estimating the risk.[1]

585. Thus a representation as to the terms upon which other insurers have undertaken the risk proposed is material;[2] as also an over-valuation of the subject insured if it is excessive.[3] Where a reasonable man would disclose the fact that he is an alien, non-disclosure by the assured that he is so is a ground of avoiding the policy.[4] Failure to disclose refusal by other companies to insure the risk is also material.[5] It is not, in general, incumbent on the insured to state the nature of his interest in the property insured.[6] It is not, in general, deemed a material fact that the insured has, prior to effecting the policy, entered into contracts with third parties which may deprive his insurer of a right of recourse in the event of a loss; but where the insured is made aware that a different rate of premium is charged according as the right of subrogation is kept open for the insurer or not, a special duty of disclosing such contracts will arise.[7] Where the insurer's question is directed to a particular fact, an answer to the question as asked is sufficient; thus a question as to the existence of other insurance is to be taken as referring only to the property proposed to be insured, and the answer is not inaccurate because the insurances on other properties are not disclosed.[8]

An insurance was effected on a warehouse in Heligoland in terms of a letter of instructions to the owner's London agents on 11th July. On the same date a fire had occurred in a boat-builder's yard, separated by one other building only from the warehouse proposed for insurance. This fire was apparently extinguished before the letter ordering the insurance was dispatched, but two days later fire again broke out in the boat-builder's workshops, and spread to the premises covered by the policy, which had in the meantime been issued. The insured was exonerated of all intention of fraud, but it was held that the fact that a fire had occurred in the neighbouring workshop ought to have been communicated when the instructions for insurance were given, and that the failure to do so vitiated the policy.[9]

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[1] *Ionides* v. *Pender*, 1874, L.R. 9 Q.B. 531, per Blackburn J. at p. 537; *Lindenau* v. *Desborough*, 1828, 8 B. & C. 586, per Bayley J. at p. 592; *Moens* v. *Heyworth*, 1842, 10 M. & W. 147, per Lord Abinger at p. 155; *Dalgleish* v. *Jarvie*, 1850, 2 M. & G. 231, per Rolfe B. at p. 243; *Yorkshire Insurance Co* v. *Campbell*, [1919] A.C. 218; *Furey*, 1922, 56 I.L.T. 109.

[2] *Sibbald* v. *Hill*, 1814, 2 Dow 263; *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363.

[3] *Ionides* v. *Pender*, *supra*.

[4] *Horne* v. *Poland*, [1922] 2 K.B. 264.

[5] *Glicksman* v. *Lancashire and General Assurance Co.*, [1927] A.C. 139.

[6] *Crowley* v. *Cohen*, 1832, 3 B. & Ad. 478.

[7] *Tate* v. *Hyslop*, 1885, 15 Q.B.D. 368; *Phœnix Assurance Co.* v. *Fire, etc., Co.*, 1886, 117 U.S. 312, 326.

[8] *Golding* v. *Royal London Auxiliary Insurance Co.*, 1914, 30 T.L.R. 350.

[9] *Bufe* v. *Turner*, 1815, 6 Taunt. 338.

586. A representation refers to the period when the contract is completed; and if, between the date of the proposal for insurance and the issue of the policy, any change of circumstance occurs, this must be communicated.[1] Where the policy provides that no insurance is to be in force till the premium is paid the duty of disclosure continues until payment.[2] The insured must disclose every material fact coming to his notice at every stage of the negotiations, whether or not his proposal has been forwarded.[3]

587. A representation must have reference to an existing state of facts; a representation as to the future is a mere expression of intention, and has no binding force, unless incorporated as a condition of the contract. The onus is upon the insurers to prove a misrepresentation.[4]

Subsection (2).—*Warranties.*

588. The parties to a policy of insurance may agree that certain facts as to which information is asked shall be deemed material. This is the effect of a provision that the statements of the insured shall be warranties, or shall be part of the contract, or shall be the basis of the contract. In any of these cases the accuracy of the statements is a condition precedent to the right to recover upon the policy, and the question whether they are material is entirely excluded.[5] The truth of the statements thereby becomes, apart from the question of materiality, a condition of liability of the insurers.[6] In *Dawsons Ltd.* v. *Bonnin* it was held that an inaccurate statement in a reply to a question in a proposal form as to the place where a lorry was ordinarily garaged was not material to assessing the premium, but that, inasmuch as the proposal form was expressed to be the basis of the contract, any inaccuracy in it made the policy void.[7] Thus, if the introduction of a steam-engine into the premises insured is expressly prohibited, the use of a steam-engine, for however short a period, and merely for the purpose of trial, will avoid the policy.[8]

Subsection (3).—*Extent of Duty of Disclosure.*

589. The duty of disclosure is subject to certain limitations. Thus the insured is not bound to disclose (1) what the insurer knows or ought

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[1] *Sillem* v. *Thornton*, 1854, 3 El. & Bl. 868, 881; *Traill* v. *Baring*, 1864, 4 Giff. 485; affd. 33 L.J. Ch. 521; *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363; *Yager and Guardian Assurance Co.*, 1912, 108 L.T. 38.

[2] *Harrington* v. *Pearl Life Assurance Co.*, 1913, 30 T.L.R. 24.

[3] *Allis Chalmers Co.* v. *Fidelity and Deposit Co.*, 1916, 114 L.T. (H.L.) 443.

[4] *Davis* v. *National Fire, etc., Insurance Co. of New Zealand*, [1891] A.C. 485.

[5] *Newcastle Fire Insurance Co.* v. *M'Morran & Co.*, 1815, 3 Dow 255; *Anderson* v. *Fitzgerald*, 1853, 4 H.L.C. 484; *Thomson* v. *Weems*, 1884, 9 App. Cas. 671; *Bancroft* v. *Heath*, 1901, 17 T.L.R. 425.

[6] *Dawsons Ltd.* v. *Bonnin*, [1922] 2 A.C. 413; *Paxman* v. *Union Assurance Society, Ltd.*, 1923, 39 T.L.R. 424; *Golding* v. *Royal London Auxiliary Insurance Co.*, 1914, 30 T.L.R. 350; *Glicksman* v. *Lancashire and General Assurance Co.*, [1927] A.C. 139 (Burglary).

[7] *Dawsons Ltd.* v. *Bonnin*, *supra*; see also *Condogianis* v. *Guardian Assurance Co.*, [1921] 2 A.C. 125.

[8] *Glen* v. *Lewis*, 1853, 8 Ex. 607.

to know as part of his business, or (2) what the insurer takes upon himself the knowledge of, or (3) what he has waived information of, or (4) what is covered by a warranty.[1]

590. Under the first of these exceptions it is a sufficient answer to a defence of concealment or misrepresentation, or even of a breach of warranty, that the insurer or his agent knew the true state of the facts when the policy was entered into.[2] *Biggar's* case [3] appears to have been decided in a contrary sense, but although it may depend on specialities, it is submitted it cannot impeach the authority of *Bawden's* case which has been followed in a number of recent decisions.[4] But it is not sufficient that the insurer might have inferred the fact from what he was told, or that at one time he was aware of the fact, if he was actually in ignorance of it when he entered into the policy.[5] It would seem to fall within the principle of these cases, and of those cited below in marine insurance, that the insured need only name the goods he keeps on his premises, and the operations carried on; he is under no obligation, in the case of well-known goods and processes, to inform the insurers whether they are hazardous or not.[6] The knowledge of an agent acquired prior to his appointment as agent for the company will not be imputed to the company.[7]

591. Under the second exception, it has been held that if an agent of the company, empowered to negotiate fire risks, inspects the buildings on which insurance is desired, and furnishes a description to the head office, the insured will not be responsible for the accuracy of the description; [8] and if the agent himself values the property insured, the policy cannot afterwards be challenged on the ground of over-valuation.

592. As regards the third exception, it has been held that where the insurers accept a proposal containing specific questions, to some of which the insured has given no reply, the insurers must be held to have waived information as regards the answers omitted.[9] The fact that no specific question is asked does not, however, imply a waiver by an insurance company of information on any particular point in regard to which the insured may have information, and which is material to

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[1] *Carter* v. *Boehm*, 1766, 3 Burr. 1905, per Lord Mansfield at p. 1910.

[2] *Newcastle Fire Insurance Co.* v. *M'Morran & Co.*, 1815, 3 Dow 255, per Lord Eldon at pp. 262, 263; *Cruickshank* v. *Northern Accident Insurance Co.*, 1895, 23 R. 147; *Bawden* v. *London and Edinburgh Assurance Co.*, [1892] 2 Q.B. 534.

[3] *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516.

[4] *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.*, 1907, 23 T.L.R. 521; *Golding, supra*; *Hough* v. *Guardian Fire and Life Assurance Co.*, 1902, 18 T.L.R. 273; *Paxman* v. *Union Assurance Society*, 1923, 39 T.L.R. 424; *Keeling* v. *Pearl Assurance Co.*, 1923, 129 L.T. 573; *Thornton Smith* v. *Motor Union Insurance Co.*, 1913, 30 T.L.R. 139.

[5] *Bates* v. *Hewitt*, 1867, L.R. 2 Q.B. 595.

[6] *Noble* v. *Kennoway*, 1780, 2 Doug. 510; *Harrower* v. *Hutchinson*, 1869, L.R. 4 Q.B. 523, per Lush J. at p. 536; *Gandy* v. *The Adelaide Marine Insurance Co.*, 1871, L.R. 6 Q.B. 746.

[7] *O'Keefe* v. *London and Edinburgh Insurance Co.*, [1928] N.I. 185.

[8] *In re Universal Non-Tariff Fire Insurance Co.* (*Forbes & Co.'s Claim*), 1875, L.R. 19 Eq. 485, 497.

[9] *Phœnix Life Insurance Co.* v. *Raddin*, 1887, 120 U.S. 183; but see *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363, per Jessel M.R.

the risk. *Bufe* [1] is an illustration of a circumstance which would not probably be made the subject of specific inquiry, but which it would be the duty of the applicant for insurance to disclose. In most proposal forms, in addition to the specific inquiries, there is usually a general question requiring the applicant to disclose any special circumstances material to the risk, and not included in the specific queries.

Subsection (4).—*Description of Subject.*

593. The description of the subject insured in a policy of fire insurance is of importance (1) for the purpose of identification, and (2) as determining and defining the risk. The description may be expressly made a warranty; and if this is done, any inaccuracy in the description, whether material to the risk or not, vitiates the policy; [2] but in general the description, so far as it relates to the risk, is to be regarded as a representation merely, and not as a warranty, and in order to avoid the policy on the ground of its inaccuracy it must be shewn that the misdescription is material. Thus if the subject insured, although not described with entire accuracy in the policy, would have fallen within the same class as regards premium, the misdescription will not avoid the policy.[3]

Subsection (5).—*Alterations.*

594. Any alteration in the subject insured, after the policy has been effected, and during its currency, which changes its identity, so that the subject described in the policy no longer exists, will clearly have the effect of bringing the contract to an end. But an alteration which does not render the description in the policy inapplicable will not avoid it on this ground.[4] Within this limit it is not very clear what structural alterations or changes in the use of the subject insured are permissible. The description of the subject insured, both as regards its structure and use, must be substantially accurate when the policy is effected, but such description is not in general a warranty, but merely a representation, and as such does not apply to the future. Thus when there is no provision as to alterations, and no warranty as to use, it has been laid down that a change of use, although increasing the risk, does not avoid the policy if the insured has acted in good faith.[5] On the other hand, the opinion was expressed that a material alteration in the structure or use of the premises after the policy is effected, whereby the risk is increased, will avoid the policy.[6] The execution of ordinary repairs upon the subject insured, even if extensive in character, has been held permissible in America in the absence of any provision against

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[1] *Bufe* v. *Turner*, 1815, 6 Taunt. 338.
[2] *Newcastle Fire Insurance Co.* v. *M'Morran & Co.*, 1815, 3 Dow 255.
[3] *Dobson* v. *Sotheby*, 1827, 1 Moo. & M. 90; *Farmer's Insurance and Loan Co.* v. *Snyder*, 1836, 30 Am. Dec. 118.
[4] *Baxendale* v. *Harvey*, 1859, 4 H. & N. 445, per Bramwell B.
[5] *Pim* v. *Reid*, 1843, 6 M. & G. 1.
[6] *Sillem* v. *Thornton*, 1854, 3 El. & Bl. 868, at p. 882.

alterations,[1] and, apart from special provision, a use or alteration which does not increase the risk does not vitiate the policy.[2]

595. Most policies, however, contain provisions dealing with alterations, or warranties as to the use of the premises, and the question is one of their proper construction. They are always interpreted so as to give the fullest liberty, compatible with their terms, to the insured. Thus in a policy on buildings, "where no fire is kept and no hazardous goods are deposited," containing a proviso "that if buildings of any description insured with the company shall be made use of to store or warehouse any hazardous goods," the policy should be void, these words must be understood of the habitual use of fire and deposit of goods.[3] When, therefore, the loss happened in consequence of making a fire and bringing a tar barrel on to the premises for the purpose of repairing the roof, it was held that the insured was entitled to recover.[4] Where the provision was against any alteration in the buildings, or in the business carried on in them, and the insurance was upon "a kiln for drying corn in use," it was held that the use of the kiln upon one occasion only for drying bark (a more dangerous operation than that of drying corn) did not amount to a change in the business carried on, and did not avoid the policy, although the premises were burned down during the drying of the bark.[5] Where there was both a warranty as to use and a condition as to alterations, the latter, which was less stringent in its terms, was held to restrict the warranty.[6]

596. If the policy deals with the question of change of risk after the policy is effected, and defines what is a hazardous use of the subjects insured, it has been held in America that any other use not expressly excepted is permitted.[7] Repairs necessary for the upkeep of the premises, although usually not included in a provision against alterations, will be prohibited by a stipulation rendering the policy void "if mechanics are employed in building, altering, or repairing the insured premises." [8] When specified operations are prohibited by such conditions, it makes no difference whether their effect would be to increase the risk or not; the question of materiality is excluded by the terms of the contract.[9]

597. When notice of alterations is provided for, it must be given within a reasonable time if no time is specified.[10] If the provision is simply that notice of alteration shall be given to the company, without any provision as to forfeiture, failure to give notice will not be regarded as a condition precedent avoiding the policy.[11] A provision against

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[1] *Jolly's Administrators* v. *Baltimore Equitable Society*, 1827, 18 Am. Dec. 288.
[2] *Curry* v. *Commonwealth Insurance Co.*, 1830, 20 Am. Dec. 547.
[3] *Thompson* v. *Equity Fire Insurance Co.*, [1910] A.C. 592.
[4] *Dobson* v. *Sotheby*, 1827, 1 Moo. & M. 90.
[5] *Shaw* v. *Robberds*, 1837, 6 A. & E. 75. [6] *Stokes* v. *Cox*, 1856, 1 H. & N. 320, 533.
[7] *Wood* v. *Hartford Fire Insurance Co.*, 1840, 35 Am. Dec. 92; but see May on Insurance, 2nd ed., s. 218. [8] *Imperial Fire Insurance Co.* v. *Coos County*, 1893, 151 U.S. 452.
[9] *Glen* v. *Lewis*, 1853, 8 Exch. 607. [10] *Pim* v. *Reid*, 1843, 6 M. & G. 1.
[11] *Joyce* v. *Maine Insurance Co.*, 1858, 71 Am. Dec. 536.

alterations usually takes the form of a clause of forfeiture, and where this is the case, it is entirely immaterial to inquire whether the loss was occasioned by the alteration, or by an increase of the risk incident to it.[1] When, on the other hand, losses arising from any particular use of the premises are excepted from the risk, it must be proved that the loss arose from the excepted risk.[2]

Section 4.—The Risk Insured against—Excepted Risks.

Subsection (1).—*Causa proxima.*

598. The risk against which a fire policy provides is loss or damage "by fire"; but to the risk so defined there are various exceptions expressed in the conditions of the policy, and intended to limit the general liability. Among the more usual of these exceptions are losses by lightning, by explosion, by incendiarism, and by riot or military or usurped power. In dealing with the question whether the loss or damage was caused by a peril insured against, the general rule is that where there are two or more causes forming a chain of events leading up to the loss, the cause nearest in point of time is to be regarded as the cause of the loss, in accordance with the maxim *causa proxima non remota spectatur*. The maxim applies whether the insurance is against marine or fire risks, or against accident.[3] Thus a policy against fire, or against perils of the sea, will cover a loss the proximate cause of which is fire, although the fire was itself caused by the negligence of the insured or his servants.[4]

599. An exception to the strict application of the maxim is, however, recognised where the loss results, although not proximately from the peril insured against, yet as a natural or necessary consequence of it.[5] Thus damage caused by water used to extinguish a fire, damage caused by the removal of goods, deterioration of machinery through water used in extinguishing the fire, and even the voluntary destruction of buildings to prevent the spread of fire, are all within the general terms of a fire policy.[6] A fire broke out in a house on the opposite side of the street from the house insured, and in consequence the walls of the former were left standing in an insecure condition. They were ordered to be taken down by the Dean of Guild; and in the course of this operation, two days after the fire, the walls fell and did considerable damage to the house insured.

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[1] *Merriam* v. *Middlesex Mutual Fire Insurance Co.*, 1838, 32 Am. Dec. 252.

[2] *Wood* v. *Hartford Fire Insurance Co.*, 1840, 35 Am. Dec. 92, at p. 95.

[3] *Marsden* v. *City and County Assurance Co.*, 1866, L.R. 1 C.P. 232; *Ionides* v. *Universal Marine Insurance Co.*, 1863, 14 C.B. (N.S.) 259; *Pink* v. *Fleming*, 1890, 25 Q.B.D. 396; *Lawrence* v. *Accident Insurance Co.*, 1881, 7 Q.B.D. 216.

[4] *Dobson* v. *Sotheby*, 1827, 1 Moo. & M. 90; *Bishop* v. *Pentland*, 1827, 7 B. & C. 219; *Columbia Insurance Co.* v. *Lawrence*, 1836 (U.S.), 10 Peters 507; 12 Curtis 216.

[5] *Isitt* v. *Railway Passengers Assurance Co.*, 1889, 22 Q.B.D. 504; *Montoya* v. *London Assurance*, 1851, 6 Exch. 451; cf. *Pink* v. *Fleming*, *supra*.

[6] Per Kelly C.B. in *Stanley* v. *Western Insurance Co.*, 1868, 3 Exch. 71, 74; *City Fire Insurance Co.* v. *Corlies*, 1839, 34 Am. Dec. 258; *Habbibhoy* v. *Bombay Fire and Marine Insurance Co.*, 1912, 107 L.T. 668 (P.C.).

It was held that the falling of the walls was a natural consequence of the fire, and that the insurers were liable.[1] Where the wall of a building, gutted by fire, fell seven days after the fire during a violent gale of wind, the fire, as the cause of loss, was held too remote, and the insurers were held not liable.[2] Where a building was damaged by lightning and was immediately afterwards further damaged by wind, it was held that lightning was the proximate cause of all the damage.[3] A ship was insured against perils of sea, but all consequences of hostilities were excepted. The vessel was torpedoed. Two days later she sank whilst moored outside harbour in heavy weather. It was held that the loss was directly caused by perils of sea, but that it was also directly caused by hostilities, and that the loss was taken out of the ambit of the policy by the exception clause.[4]

Subsection (2).—*Excepted Risks generally.*

600. Where the policy excepts certain risks, liability will be excluded for all losses which are a natural result of or are reasonably to be expected from the operation of the excepted risk.[5] The usual clause of excepted risks is as follows: "This policy does not cover (*certain specified articles, such as jewels, pictures, etc.*), nor loss or damage by fire to property occasioned by or happening through its own spontaneous fermentation or heating; nor loss or damage by fire arising by or through invasion, foreign enemy, riot, civil commotion, or military or usurped power; nor loss or damage by explosion, except loss or damage by explosion of gas in the premises referred to in this policy, not forming part of any gaswork." Some policies include, in addition, "loss or damage to stock or goods whilst undergoing any process in which the application of fire-heat is necessary," "loss by lightning," and "loss by incendiarism." Some of these exceptions merely express the rule of common law; while others substantially modify the rule of law in favour of the insurer. It is proposed to deal with them seriatim, subject to the general observation that differences in the terms of the clause, although apparently slight, may lead to a difference of construction.

Subsection (3).—*Lightning.*

601. A loss by lightning, not accompanied by fire, is not covered by a fire policy, and it has been held that an express exception of "losses by lightning" means "losses by fire originated or caused by lightning,"

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[1] *Johnstone* v. *West of Scotland Insurance Co.*, 1828, 7 S. 52; *Re Hooley Hill Rubber Co.*, [1920] 1 K.B. 257.

[2] *Gaskarth* v. *Law Union Insurance Co.*, Times, 24th July 1876, per Lindley L.J.

[3] *Roth* v. *South Easthope Farmers' Mutual Fire Insurance Co.*, 1919, 44 Ont. L.R. 186.

[4] *Leyland Shipping Co.* v. *Norwich Union Insurance Co.*, [1918] A.C. 350.

[5] *Walker* v. *London and Provincial Insurance Co.*, 1888, 22 L.R. Ir. 572, *infra*; see also *Mutual Insurance Co.* v. *Tweed*, 1868 (U.S.), 7 Wallace 44; *Ætna Fire Insurance Co.* v. *Boon*, 1877, 95 U.S. 117, at p. 130.

which would otherwise, on the principle of proximate cause, fall within the policy.[1]

SUBSECTION (4).—*Overheating.*

602. Damage to goods whilst undergoing a process of manufacture, by the unskilful or negligent use of heat as an agent in the process, is not a loss by fire within the general terms of a fire policy, and it is thus immaterial whether it is excepted from the risk or not.[2] On the same principle, damage wholly caused by the explosion of a steam-boiler in the ordinary course of working is not covered by a fire policy, but loss by fire which is itself caused by the scattering of lighted materials by the explosion will be covered unless expressly excepted from the risk.[3] A cargo of rosin was insured against fire. During the voyage it heated and gave out fumes. The captain, thinking there was a fire, turned compressed steam into the hold, damaging the rosin. It was held that there was no loss by fire within the meaning of the policy.[4]

SUBSECTION (5).—*Explosion of Gunpowder or Inflammable Gas.*

603. Three cases may arise under this exception: (1) where the damage is entirely due to an explosion not accompanied by fire; (2) where the fire originates in an explosion; and (3) where the explosion occurs in the course of a fire. A loss exclusively due to explosion is not covered by a fire policy.[5] Insurers were held not to be liable where a gunpowder magazine exploded at a distance of about a mile from the insured premises, and the damage was due to the concussion alone,[6] but it is thought that the principle of the decision would apply equally if the explosion occurred on the premises insured. In America it has been held that when an explosive vapour comes in contact with a gas jet or other ordinary light in premises where a process of manufacture is carried on, and an explosion occurs, the loss is by explosion and not by fire, although theoretically there must have been ignition and combustion of the gas before its explosion.[7] When an explosion occurs in the course of a fire, and the insured is permitted to keep gunpowder on the premises, the loss by explosion as well as by fire would be covered, the explosion being a natural incident of the fire, which the insurers must be held to have had in view when the permission to store gunpowder

[1] *Kenniston* v. *Mercantile County Mutual Insurance Co.*, 1843, 40 Am. Dec. 193; but see *infra*, *sub voce* Explosion of Gunpowder; see also *Roth*, *supra*; *Gordon* v. *Rimington*, 1807, 1 Camp. 123.

[2] *Austin* v. *Drew*, 1816, 6 Taunt. 436; 2 Marshall 130; see also reports at *Nisi Prius*, Holt 126; 4 Camp. 360; *Scripture* v. *Lowell Mutual Insurance Co.*, 1852, 57 Am. Dec. 111.

[3] *Millaudon* v. *Western Marine Insurance Co.*, 1849, 50 Am. Dec. 550.

[4] *Watson & Son* v. *Firemen's Fund Insurance Co. of San Francisco*, [1922] 2 K.B. 355.

[5] *Re Hooley Hill Rubber and Chemical Co.*, [1920] 1 K.B. 257 (C.A.), per Scrutton L.J. at p. 272; *Curtis's & Harvey (Canada) Ltd.* v. *North British and Mercantile Insurance Co*, [1921] A.C. 303 (P.C.).

[6] *Everett* v. *The London Assurance*, 1865, 19 C.B. (N.S.) 126.

[7] *United Life, Fire, and Marine Insurance Co.* v. *Foote*, 1872, 10 Am. Rep. 735; *Transatlantic Fire Insurance Co.* v. *Doosey*, 1880, 40 Am. Rep. 403; *contra*, *Scripture* v. *Lowell Mutual Insurance Co.*, 1852, 57 Am. Dec. 111.

was given.[1] Again, a fire policy will, unless there is an express exception of losses by explosion, cover a loss by fire although the fire originated in an explosion.[2] Where a company engaged in the manufacture of explosives insured its property against loss "directly caused by . . . war . . . and/or explosion directly caused thereby," a series of explosions injured the company's property. The company were held entitled to proof that the explosions had been caused by an unknown enemy agent.[3]

604. A policy provided that the company should not be responsible "for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." The policy covered certain buildings and their contents in which a process of manufacturing oil from "shoddy" was carried on. An inflammable vapour escaped from the vessel containing it owing to a leak, and took fire at a lamp. It burned for a short time, setting fire to certain articles in its neighbourhood. It then exploded, causing great damage by concussion, after which the fire became general. The explosion was held not to be an explosion "by gas" within the meaning of the proviso to the exception, these words referring to common coal gas. The case was treated on the footing that the explosion had occurred during the course of the fire, and it was held that the exception excluded liability (1) for the loss due to explosion, and (2) for the loss caused by the fire so far as due to the explosion, limiting the insured's right to recover to the loss by fire before the explosion, and to such loss after the explosion as he could prove was independent of it.[4] In a case decided in the Outer House by Lord Kyllachy the policy contained the following special clause dealing with explosions of gunpowder: "The company will not be responsible for damage arising from the explosion of gunpowder, or in consequence thereof." A fire originated in a cellar where several kegs of gunpowder were stored. These exploded, and the fire found its way into the pursuer's shop in consequence of the roof of the cellar being blown out by the explosion. His Lordship held that the exception covered the loss by fire, which spread to the insured goods as a result of the explosion, and that the insurers were not liable.[5] The question has been raised in America, upon the terms of the general clause of exception, whether "loss or damage by explosion" is to be read as covering losses caused by fire originating in explosion, or as confined to losses by explosion itself. The former construction was adopted in two cases [6] and the latter in two other cases.[7]

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[1] *Renshaw* v. *Missouri State Mutual Fire and Marine Insurance Co.*, 1890, 23 Am. St. Rep. 904; *Waters* v. *Merchants Louisville Insurance Co.*, 1837 (U.S.), 11 Peters 213; 12 Curtis 400, at p. 406.

[2] Cases cited *infra*, and *Transportation Co.*, 1870 (U.S.), 12 Wallace 194, at p. 200.

[3] *Nobel's Explosives Co.* v. *British Dominions General Insurance Co.*, 1918 S.C. 373.

[4] *Stanley* v. *Western Insurance Co.*, 1868, L.R. 3 Exch. 71.

[5] *Aitken Bros.* v. *The Midland Counties Insurance Co.*, 3rd December 1890, not reported.

[6] *United Life, Fire, and Marine Insurance Co.* v. *Foote*, 1872, 10 Am. Rep. 735; *Transatlantic Fire Insurance Co.* v. *Doosey*, 1880, 40 Am. Rep. 403.

[7] *Commercial Insurance Co.* v. *Robinson*, 1872, 16 Am. Rep. 557, and *Boatman's Fire and Marine Insurance Co.* v. *Parker*, 1872, 13 Am. Rep. 228.

SUBSECTION (6).—*Incendiarism.*

605. Where the policy excepts losses occasioned by incendiarism, the exception is not confined to acts of incendiarism on the part of the insured or upon the insured premises. It covers all loss by fire which is the natural consequence of an act of incendiarism, although committed on premises other than those insured, and without any intention on the part of the incendiary to destroy the buildings insured. If no new cause intervenes between the act of incendiarism and the fire sufficient to operate as a cause by itself, the loss is a loss by incendiarism.[1] When property is destroyed by fire the onus of proof is upon the insurers to shew that the fire originated in the act of an incendiary, so as to make the exception applicable.[2]

SUBSECTION (7).—*Riot or Civil Commotion.*

606. The full clause in which this exception occurs includes "loss or damage by fire arising by or through invasion, foreign enemy, riot, civil commotion, or military or usurped power." Originally the clause did not include riot and civil commotion; they were introduced in consequence of the decision in a case where it was held that the burning of a house by a mob during a bread riot did not fall within the exception of loss or damage by usurped power, a term which referred to an organised attempt by force of arms to usurp the authority of the established Government.[3] In the undernoted case of *Langdale* the exception contained the words "civil commotion," which were held to cover the case of the Catholic Riots in 1780, and to exclude liability for a house destroyed by fire by the mob.[4] The meaning of the words "caused directly or arising from civil commotion or riot" has been canvassed in recent decisions. Commotion implies something in the nature of tumult or violence or threats of violence; if the loss is attributable to such commotion, it falls within the exception, and there is no need to prove a commotion at the time and place where the loss occurred.[5] It is thought that the terms riot and civil commotion would not cover a mere breach of the peace; they are used in the English sense, and are really equivalent to mobbing and rioting, and imply that a number of persons are assembled with a common object (other than revolution or insurrection), which they proceed to carry out by violent means, to the alarm of the lieges.[6] The word "riot" must be read in its ordinary legal sense.[7]

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[1] *Walker* v. *London and Provincial Insurance Co.*, 1888, 22 L.R. Ir. 572.

[2] *Gorman* v. *Hand-in-Hand Insurance Co.*, 1887, Ir. R. 11 C.L. 224.

[3] *Drinkwater* v. *London Assurance*, 1767, 2 Wils. 363.

[4] *Langdale* v. *Mason*, 1780, 2 Park on Insurance, 8th ed., p. 965.

[5] *London and Manchester Plate Glass Co.* v. *Heath*, [1913] 3 K.B. 411; *Craig* v. *Eagle Star Co.*, 1922, 56 I.L.T. 145; *Cooper* v. *General Accident Assurance Corporation*, [1922] 2 I.R. (H.L.) 214; *Motor Union Insurance Co.* v. *Boggan*, [1923] 2 I.R. (H.L.) 136.

[6] Hume, vol. i. chap. 16; Hawkins, Pleas of the Crown, chap. 65; *Field* v. *Receiver of Metropolitan Police*, [1907] 2 K.B. 853, per Phillimore J. at p. 860, approved in *Ford* v. *Receiver of Metropolitan Police*, [1921] 2 K.B. 344.

[7] *London and Lancashire Fire Insurance Co.* v. *Bolands*, [1924] A.C. 836.

Subsection (8).—*Military or Usurped Power.*

607. A question which has been raised upon this clause is whether the terms are to be read conjunctively or disjunctively. The question was discussed in a case already referred to,[1] where the military forces of the American Federals, before evacuating a town, had destroyed by fire certain buildings to prevent them falling into the hands of the Confederate troops. It was held that the real cause of the loss was the usurped power of the besieging force, and that, even if the clause were read as meaning military *and* usurped power, the insurers would not be liable. An opinion was, however, indicated that the true meaning of the clause was disjunctive, and that it included acts by regular military power as well as by usurped military power. The phrase covers acts done by the forces of the Crown in repelling the enemy or suppressing a rebellion.[2] It also applies to an armed and organised rebellion which has got the length of assuming authority by making laws and punishing their disobedience, but the phrase cannot be precisely defined.[2] It covers fire caused by a bomb from enemy Zeppelin,[3] and destruction during rebellion.[4]

Section 5.—Adjustment of the Loss.

Subsection (1).—*Notice—Preliminary Proofs, etc.*

608. If parties expressly make it a condition precedent to the liability of the insurers that the insured should state or prove his claim in any particular manner, then, however immaterial the provision may seem, a failure to comply with it will defeat the insured's right to recover, unless it appear to be so capricious and unreasonable that a Court of law ought not to enforce it, or it is *sua natura* incapable of being made a condition precedent.[5] Thus if the policy require as a condition of the insurer's liability that notice of the loss, or preliminary proofs of the loss, shall be given within a specified time, it is essential that this condition should be fulfilled.[6] It was made a condition of the policy in the case last cited, that "all persons insured by this company, sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in M.; and within fifteen days after such fire deliver in as particular an account of their loss or damage as the nature of the case will admit of." The insured presented no account within fifteen days. It was held that he was not entitled to recover. Under an accident policy it has been held that it was not a sufficient answer to a plea founded on the failure

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[1] *Ætna Fire Insurance Co.* v. *Boon*, 1877, 95 U.S. 117.
[2] *Curtis & Sons* v. *Mathews*, [1919] 1 K.B. 425.
[3] *Rogers* v. *Whittaker*, [1917] 1 K.B. 942.
[4] *Curtis, supra*, and *H.M. Secretary of State for War* v. *M.G.W.R. Co.*, [1923] 2 I.R. 102.
[5] *London Guarantee Co.* v. *Fearnley*, 1880, 5 App. Cas. 911, per Lord Watson at p. 919.
[6] *Mason* v. *Harvey*, 1853, 8 Exch. 819; *Roper* v. *Lendon*, 1859, 1 El. & El. 825.

to give notice, that the insured was killed by the accident, and that it was therefore impossible to give notice.[1] But in the Supreme Court of the United States it has been held that the insurers could not plead want of notice when the insured had become insane.[2] In general the burden of proof in actions upon policies containing exceptions from liability rests upon the party pleading the exception after proof of the loss by the insurer.[3]

609. A condition that the insured's statement of loss should be accompanied by the certificate of a minister has been sustained as a condition precedent, where the minister refused, without fault on the part of the insured, to give the certificate.[4]

610. When the terms of the policy do not clearly indicate that notice or proof of loss within the specified time is a condition precedent, the Court will adopt the construction most favourable to the insured. Thus where it was provided that within fifteen days the insured should deliver an account of the property destroyed, and that "in default thereof no claim in respect of such loss or damage shall be payable until such notice, account, etc., are given and produced," it was held that the effect of the last words was to differentiate the case from *Mason*, and that delivery of an account within fifteen days was not a condition precedent.[5] When the proof to be furnished was "proof satisfactory to the directors of the company . . . together with such further evidence or information, if any, as the said directors shall think necessary to establish that claim," it was held that this provision must not be read so as to render the contract inoperative, and that accordingly the proof to be furnished must be such as reasonably to satisfy the directors, and that they could not capriciously reject satisfactory proof.[6]

611. Fraud on the part of the insured in the statement in the preliminary proofs vitiates the contract, and entitles the company to reject the whole claim.[7] This is usually made an express condition of the contract.[8] Statements in the preliminary proofs are inadmissible as evidence for the insured, but they may be used against him as admissions against interest, subject to his right to shew that the statements are inaccurate and were inadvertently made.[9]

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[1] *Gamble* v. *Accident Insurance Co.*, 1869, Ir. R. 4 C.L. 204; *Patton* v. *Employers Liability Assurance Corporation*, 1887, 20 L.R. Ir. 93.

[2] *Germania Fire Insurance Co.* v. *Boykin*, 1870 (U.S.), 12 Wallace 433; May on Insurance, 2nd ed., s. 465.

[3] *Munro Brice & Co.* v. *War Risks Association*, [1918] 2 K.B. 78; *Cooper* v. *General Accident Assurance Corporation, Ltd.*, [1922] 2 I.R. 38.

[4] *Worsley* v. *Wood*, 1796, 6 T.R. 710, at p. 718.

[5] *Weir* v. *Northern Counties Insurance Co.*, 1879, 4 L.R. Ir. 689; see also *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.*, 1887, 19 Q.B.D. 237.

[6] *Braunstein* v. *Accidental Death Insurance Co.*, 1861, 1 B. & S. 782; *Ballantine* v. *Employers Insurance Co. of Great Britain*, 1893, 21 R. 305, per Lord Rutherfurd Clark.

[7] *Haigh* v. *De la Cour*, 1812, 3 Camp. 319; 13 R.R. 813.

[8] *Chapman* v. *Pole*, 1870, 22 L.T. (N.S.) 306; *Claflin* v. *Commonwealth Insurance Co.*, 1883, 110 U.S. 81; and see *Beauchamp* v. *Faber*, 1898, 14 T.L.R. 544.

[9] May on Insurance, 2nd ed., s. 465.

SUBSECTION (2).—*Waiver.*

612. Since the conditions as to preliminary proofs are inserted for the benefit of the insurers, they may be waived by them, either expressly or by conduct on their part leading the insured to believe that compliance with them will not be required, or will be useless. Thus the condition either as to notice or proof of loss is held to be waived when the company repudiates all liability upon the policy on other grounds than the want of notice or the absence or insufficiency of the preliminary proofs, *e.g.* on the ground of fraud,[1] or on the ground that no completed contract had been concluded at the time of the loss.[2] In such cases the insured is entitled to assume that it would be useless to furnish preliminary proofs, since this would not meet the defence relied on by the company.[3] Similarly, in a recent case of accident insurance it was held that where the company insist upon a *post-mortem* examination of the deceased (after the period prescribed by the policy for giving notice has expired), and the examination is made, they are precluded from founding on the failure to give notice within the specified time.[4] If the company receive preliminary proofs, and retain them until the time specified has expired without intimating to the insured that they are not sufficient or satisfactory, or do not comply with the terms of the policy, they will in the same way be held to have waived objection on these grounds.[5] The exercise of the power of entry and salvage may prevent the company from contending that the assured had failed to comply with the terms of a condition as to delivery of particulars of loss.[6]

SUBSECTION (3).—*Reinstatement and Measurement of the Loss.*

613. The amount of the loss under a contract of indemnity—other than a valued policy—is always a question of fact, and there is no hard-and-fast rule by which it is to be estimated. It is a peculiarity of a fire policy that it contains a stipulation that "the company may, if it think fit, reinstate or replace property damaged or destroyed, instead of paying the amount of the loss or damage," thus providing two alternative and distinct methods of settlement. If the insurer elects to reinstate, the contract becomes a building contract, and the pecuniary measure of the insurer's obligation has no necessary relation to the amount for which he would have been liable under the other alternative, to indemnify by payment.[7] On this principle an election once made to reinstate cannot

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[1] *Strong* v. *Harvey*, 1825, 3 Bing. 304, at p. 312.

[2] *Taylor* v. *Merchants Fire Insurance Co.*, 1849 (U.S.), 9 Howard 390; 18 Curtis 191; and see *Royal Insurance Co.* v. *Martin*, 1903, 192 U.S. 149.

[3] *Fireman's Insurance Co. of Baltimore* v. *Floss*, 1887, 1 Am. St. Rep. 398.

[4] *Donnison* v. *Employers' Accident and Live Stock Insurance Co.*, 1897, 34 S.L.R. 510.

[5] May on Insurance, 2nd ed., s. 468.

[6] *Yorkshire Insurance Co.* v. *Craine*, [1922] 2 A.C. 541.

[7] *Morrell* v. *Irving Fire Insurance Co.*, 1865, 88 Am. Rep. 396.

be recalled, although the reinstatement would place in the hands of the insured a much more valuable building than before.[1] Even where it is impossible to reinstate a house in its old form the insurers must pay damages for failure to reinstate after they have decided to do so.[2] On the other hand, where the insured has lost possession of the premises, he cannot insist that he should be paid an indemnity for machinery destroyed or injured on the premises if the company elect to reinstate; but the company are not entitled to perform their obligation so as to confer no benefit upon the insured, and to reinstate in premises no longer in his occupation, but may be required to restore the machinery on other premises to which the insured has removed it.[3] These cases are confirmed by the view expressed by the House of Lords in the case above referred to,[4] that the amount required to reinstate the subjects injured is not necessarily the limit for which insurers are liable under a contract of indemnity and apart from the exercise of the option to reinstate. The House also rejected the view that part of the depreciation in value must be treated as attaching to the site of the buildings and machinery, and thus as not covered by a fire policy. On this point Lord Selborne said (at p. 711): "The site remains at whatever may have been its value, apart from and independent of the buildings which stood upon it. Any greater value which it had when the buildings which have been destroyed stood upon it was entirely due to those buildings, and as they were insured, and have been destroyed by fire, the contract of indemnity covers, in my opinion, the whole of that difference, less salvage only."

614. The amount which the insured is entitled to recover is limited (1) by the injury to the subject insured, (2) by the extent of his interest in the subject, (3) by the amount insured. Thus a mortgagee cannot recover more than the amount of his debt, a vendor under an uncompleted contract of sale can only recover the unpaid purchase money, and a warehouseman or carrier who insures his own interest can only recover, in respect of his customer's goods, the amount of his charges and commission. As to the value of the interest of a tenant, see per Bowen L.J., in *Castellain*;[5] and as to the landlord's interest in the analogous case of a covenant in the lease to repair on the part of the tenant, see *Metge*.[6] A motor-car was insured for full value, the proposal stating the present value to be £250; the policy was renewed, and the value at time of destruction was £400. It was held that the insured could recover £400 if the increase of value had wholly accrued since the date of renewal, but if partly before that date he could only recover £250.[7] In a valued policy on loss of profits of a business due to fire on the premises, where profits were defined as "net profits plus standing

[1] *Brown* v. *The Royal Insurance Co.*, 1859, 1 El. & El. 853.
[2] *Alchorne* v. *Savill*, 1825, 4 L.J. (O.S.) Ch. 47.
[3] *Anderson* v. *Commercial Union Assurance Co.*, 1885, 55 L.J. Q.B. 146.
[4] *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 1888, 13 App. Cas. 699.
[5] *Castellain* v. *Preston*, 1883, 11 Q.B.D. 386, per Bowen L.J. at pp. 399–400.
[6] *Metge* v. *Kavanagh*, 1877, Ir. R. 11 C.L. 431.
[7] *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

charges," it was held that there was no implied term that profits made at temporary premises after the fire should reduce loss payable by the insurers, but that the reduction in standing charges must be accounted for and diminish that loss.[1]

Subsection (4).—*Arbitration.*

615. It is now settled that when it is made in express terms a condition precedent to the right to sue upon the policy that the amount, if any, which the insurers are liable to pay shall be determined by arbiters, the Courts will not entertain an action upon the policy except for the amount so determined. The rule applies whether the reference is to named or unnamed arbiters,[2] and whether the matter submitted to arbitration is a matter of law or of fact.[3] The only question is whether the terms of any particular clause of reference have this effect. If it is a mere collateral agreement, not going to the root of the contract, the jurisdiction of the Courts of law is not ousted.[4] Where a policy provides for the assessment of losses by the insured's auditors the insurance company will be bound by the assessment unless it be shown that the auditors have misdirected themselves in arriving at the amount of the loss, *e.g.* have not taken into consideration the fact that the losses recoverable must be losses arising solely in consequence of the fire.[5] Where an arbitration clause provided "If any difference arises as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator . . ." it was held that the arbitrator had no concern with anything but the actual figures of the loss and that he could not decide whether the insurers were liable or not.[6]

PART IV.—LIFE INSURANCE.[7]

Section 1.—Introductory.

616. Life insurance is a contract whereby the insurer agrees to pay on the death of the person whose life is insured a given sum in consideration of the payment by or on behalf of the assured of certain sums called premiums. This contract differs from most other contracts of insurance inasmuch as it is not a contract of indemnity.

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[1] *City Tailors, Ltd.* v. *Evans*, 1921, 91 L.J. (K.B.) 379 (C.A.). [2] 57 & 58 Vict. c. 13.

[3] *Caledonian Insurance Co.* v. *Gilmour*, 1892, 20 R. (H.L.) 13; *Scott* v. *Avery*, 1856, 5 H.L.C. 811; *Viney* v. *Bignold*, 1887, 20 Q.B.D. 172; *Bidston* v. *Dog, Poultry, and Pigeon Insurance Co.*, 1895, 32 S.L.R. 516; *Gaw* v. *British Law Fire Insurance Co.*, 1908, 1 Ir. R. 245, at p. 252.

[4] *Trainor* v. *Phœnix Assurance Co.*, 1892, 65 L.T. 825; contrast *Tredwen* v. *Holman*, 1862, 1 H. & C. 72 with *Horton* v. *Sayer*, 1859, 4 H. & N. 643.

[5] *Recher & Co.* v. *North British and Mercantile Insurance Co.*, [1915] 3 K.B. 277.

[6] *Jureidini* v. *National British and Irish Millers Insurance Co.*, [1915] A.C. 499, per Lord Haldane at p. 505.

[7] General Authority.—MacGillivray, Insurance Law, 1912.

Section 2.—Insurable Interest.

617. The Life Assurance Act, 1774,[1] requires that the person to whom a policy is issued should have an insurable interest in the life insured. The statute enacts: (1) That from and after the passing of the Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever. (2) That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote. (3) That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events. The Act does not extend to insurances on ships, goods, or merchandises.

618. It has been held in Scotland that the statute merely furnishes a defence to the insuring company against a claim on the policy, but that if the company waive the defence the question who is entitled to the proceeds of the policy falls to be determined as if the statute did not exist.[2] This decision was formally approved in the Court of Session in the case of *Carmichael* v. *Carmichael's Exrx.*,[3] and although the House of Lords reversed the latter decision,[4] *Hadden's* case is treated as being a valid decision.[5] In the English Courts, however, the maxim *ex turpi causa non oritur actio* has been applied. It has been held in England that a marine policy declared null by 19 Geo. II. c. 37, in terms similar to the 1774 Act, was absolutely so, even although the insurer did not plead the nullity.[6]

619. As interpreted by the leading cases, the value of the interest referred to in the third section is to be taken at the time when the policy is effected, and not when the event insured against happens. Accordingly, the cessation of the insured's interest, subsequently to the issue of the policy, will not render the insurance void. Thus a creditor who has insured his debtor's life, in his own name and on his own behalf, by a policy valid at its inception, may recover the amount insured, not exceeding the original debt, although the debt has been discharged before the policy becomes a claim, and he may assign the policy to one

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[1] 14 Geo. III. c. 48.
[2] *Hadden* v. *Bryden*, 1899, 1 F. 710.
[3] 1919 S.C. 636.
[4] 1920 S.C. (H.L.) 195.
[5] See per Lord Dunedin at pp. 198 and 199.
[6] *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214.

who has no interest.[1] A life policy is not, therefore, a contract of indemnity, like a fire or marine policy, under which the insured is only entitled to recover the amount of his actual loss, and which can only be validly assigned to one who has an interest in the subject insured. In neither case, however, can the parties by agreement dispense with proof of interest; and thus it is no answer to the plea of want of interest that the insurer was aware of the nature of the interest when the policy was issued, and agreed to regard it as sufficient.[2]

620. The interest required by the statute is a pecuniary interest, and one which is capable of legal enforcement.[3] It must therefore depend either on contract, or on the obligation of maintenance which the law in certain cases attaches to relationship. In the first case the contract must establish between the person obtaining the insurance and the person whose life is insured, the relation of debtor and creditor or of cautioner and principal debtor, or otherwise create a reasonable expectation of advantage or benefit from the continuance of the life.[4]

621. Where the relation of debtor or creditor exists, it is not necessary, to sustain a policy for the benefit of the creditor on the debtor's life, that the debt should be of ascertainable amount, or should be immediately exigible. When the interest exists, but its value is not definitely ascertainable at the time the policy is effected, it will be held to have the value which the parties have put upon it in the policy, unless this value exceeds the actual extent of the assured's interest at any time. In the case of *Barnes* v. *The London, Edinburgh, and Glasgow Life Insurance Co.*,[5] the policy was in the name of the plaintiff upon the life of her stepsister, who was, both at the date of effecting the policy and at her death, a minor. The plaintiff had voluntarily undertaken to educate and maintain her stepsister, and had given a promise to that effect to the child's mother. The policy was held valid on the ground that the assured had an interest as creditor in the life insured, because she had a prospective claim to repayment of the sums she had expended on the child's behalf. The amount of these advances was necessarily uncertain when the policy was effected, but, on the principle stated, the policy was sustained for the sum insured. Had the assured been under a legal obligation to support her stepsister, the Court indicated that the policy would have been void, because no claim to repayment would in that case have arisen. *Barnes's* case is explained by Lord Alverstone in *Harse* v. *Pearl Life Assurance Co.*,[6] and apparently disapproved in *Griffiths* v. *Fleming*.[7]

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[1] *Dalby* v. *India and London Assurance Co.*, 1854, 15 C.B. 365 ; *Law* v. *Indisputable Co.*, 1855, 1 Kay & J. 223.

[2] *Anctil* v. *Manufacturers' Life Insurance Co.*, [1899] A.C. 604 ; *Lucena* v. *Craufurd*, 1802–1806, 3 Bos. & Pul. 75, per Chambre, J., 101 ; see, however, an opinion *contra* by Lord Kincairney in *Turnbull & Co.* v. *Scottish Provident Institution*, 1896, 34 S.L.R. 146.

[3] *Halford* v. *Kymer*, 1830, 10 B. & C. 724 ; *Hebdon* v. *West*, 1863, 3 B. & S. 579.

[4] *Branford* v. *Sanders*, 1877, 25 W.R. 650.

[5] [1892] 1 Q.B. 864.

[6] [1903] 2 K.B. 92.

[7] [1909] 1 K.B. 805, per Kennedy L.J. at p. 819.

622. On the same principle, it has been decided in America that a partner has an insurable interest in the life of his co-partner, although such interest is not definite or ascertained. The interest arises from the contract of partnership, the effect of which is to establish a joint obligation for the company's debts and a reasonable expectation of advantage and benefit from the services and credit of the co-partner, a benefit or advantage depending on the continuance of his life.[1] For a similar reason, a person who has acquired a right to a proportion of the earnings of another during a certain period has an interest in the life of the latter, not the less insurable that at the time when the insurance is effected it cannot be valued or apportioned. Where a clerk or servant has a contract for service for a number of years at an annual salary, he has an insurable interest in the life of his employers.[2] Conversely, the life of a servant or agent, whose services may be a source of profit, is also insurable by his employer.[3] In that case, the value of the interest does not depend on the amount paid as wages or salary, which would not be due if the employment were terminated by the death of either of the parties to the contract. It depends on the expectation of pecuniary advantage to the employer from the engagement, which would be frustrated by the death of the person employed. But where there is no contract of service to provide a basis of valuation, a second policy may be declared void, in respect that the previous policy dealt with the whole insurable interest.[4]

623. A creditor who insures his debtor's life in his own name is, in general, on the same principle, entitled to cover future advances by his policy. In the case of loans upon reversions or on post-obit bonds, the interest on the loan is sometimes allowed to accumulate for a definite period, or until the expectancy is realised. In such cases the lender has an insurable interest in the borrower's survivance, to the extent not only of the original advance, but of the interest for the period agreed on, and the premiums of insurance.[5] But if the debtor does not assign any contingent right in security, a policy on his life in the creditor's name, covering interest on the loan and premiums for a long period of years, would probably be held invalid under the statute, because the creditor in that case would have no substantial interest in his debtor's life apart from the policy.

624. Where the value of the interest is ascertainable at the time the insurance is effected, the rule is that the policy will only be enforceable for that amount. Thus in *Branford* v. *Sanders*,[6] where a policy was taken out by one of two joint obligants under a bond, upon the life of his co-obligant, for the whole sum due, the policy was treated as effectual only to the extent of one-half of that sum, on the ground that this

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[1] *Connecticut Mutual Life Insurance Co.* v. *Luchs*, 1882, 108 U.S. 498.
[2] *Hebdon* v. *West*, 1863, 3 B. & S. 579.
[3] *Turnbull & Co.* v. *Scottish Provident Institution*, 1896, 34 S.L.R. 146.
[4] *Simcock* v. *Scottish Imperial Insurance Co.*, 1902, 10 S.L.T. 286.
[5] *Ulrich* v. *Reinochl*, 1891, 24 Am. Rep. 534.
[6] 1877, 25 W.R. 650.

represented the true value of the insured's interest in his co-debtor's life at the date of the policy. In other words, the interest was limited to the share due by the person whose life was insured, for which, in addition to his own share, the assured would become liable upon the death and insolvency of his co-obligant. In *Hebdon* v. *West* [1] it was held, on the same principle, that an employee, under contract with his employer for a fixed period and at a fixed salary, had an insurable interest in his employer's life, but only to the extent of the capitalised value of the salary for the period in question.

625. As regards the interest arising from relationship, the principle is that, apart from a legal obligation to support, relationship does not confer an insurable interest. It has accordingly been held in England that a wife has an insurable interest in her husband's life, and a child in the life of its parent, but that a husband has no insurable interest in his wife's life, or a father in his children's.[2] In England a parent has no direct claim for maintenance against a child, and consequently has no insurable interest in his life; but the rule is otherwise in Scotland, where the law imposes an obligation of maintenance upon children.[3] As regards the case of a wife, it seems to have been assumed in Scotland that the husband had an interest in her life sufficient to sustain a policy; but the question has never been the subject of direct decision.[4] By the law of Scotland, a husband is entitled to pecuniary compensation, apart from special damage, for the death of his wife, where the claim arises *ex delicto*, and there seems no reason why the loss by her death should not have a pecuniary value when the claim is founded upon contract.[5] The fact that an indigent husband has now a claim to maintenance from his wife under the Married Women's Property (Scotland) Act, 1920,[6] seems to put a husband's insurable interest in his wife's life beyond a peradventure. Even in England a husband's insurable interest in his wife's life is recognised.[7] In America near relationship, combined with actual dependence of the one party on the other for support, is held, apart from any legal claim, to give an insurable interest. Hence a sister actually supported by her brother was held to have an insurable interest in his life.[8]

626. It has already been pointed out that the statute of Geo. III. does not apply to transactions with the policy subsequent to its issue. A policy, originally valid, may accordingly be assigned to one who has no interest in the life insured.[9] It is in this way possible in many cases

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[1] 1863, 3 B. & S. 579.

[2] *Halford* v. *Kymer*, 1830, 10 B. & C. 724; *Worthington* v. *Curtis*, 1875, 1 Ch. D. 419; followed in *Att.-Gen.* v. *Murray*, [1904] 1 K.B. 165; *Reed* v. *Royal Exchange Assurance Co.*, 1795, 2 Peake's Additional Cases, 70; *Shilling* v. *Accidental Death Co.*, 1858, 1 F. & F. 116.

[3] *Hadden* v. *Bryden*, 1899, 1 F. 710; *Carmichael* v. *Carmichael's Exrx.*, 1919 S.C. 636; not reversed on this point, 1920 S.C. (H.L.) 195.

[4] See *Wight* v. *Brown*, 1849, 11 D. 459.

[5] May on Insurance, 2nd ed., s. 104.

[6] 10 & 11 Geo. V. c. 64.

[7] *Griffiths* v. *Fleming*, [1909] 1 K.B. 805.

[8] *Ætna Life Insurance Co.* v. *France*, 1876, 94 U.S. 561; *Currier* v. *Continental Life Insurance Co.*, 1885, 52 Am. Rep. 134, and note by reporter, 135; May on Insurance, 2nd ed., ss. 103–107.

[9] *Ashley* v. *Ashley*, 1829, 3 Sim. 149.

to evade the statute by getting persons to effect policies on their lives and then to sell them. Such transactions are, however, illegal, and the Courts will not sanction an assignment merely for the purpose of evading the statute. It has accordingly been held in more than one case that a policy on the life of one person and expressed to be for his benefit, but really intended, *ab initio*, for the benefit of another, to whom it is immediately assigned, and by whom all the premiums are paid, is void.[1]

627. Under the second section of the Act it has been held that a policy of insurance issued to a wife on her husband's life, but really intended for the benefit of the husband, was void by reason of the omission to insert his name as the person for whose use and benefit the policy was effected.[2]

Section 3.—Formation of Contract.

628. The negotiations for a life policy begin with the proposal for insurance containing information as to the life which it is proposed to insure. This is usually supplemented by a reference to friends, and by a medical examination. The effect of these transactions on the validity of the contract is considered below.[3] Where a company accepts a proposal for life insurance, the acceptance is usually subject to the condition that the insurance shall not begin till the premium is paid. If the risk terminates by the death of the insured before tender of the premium, the company is not liable.[4] Nor is the agreement to insure regarded as concluded until tender of the premium, so that the company is not bound to issue a policy in implement of this agreement if, in the interval, the risk has materially altered. In *Canning* v. *Farquhar* [5] a proposal for insurance had been accepted, but, before the proposer had signified his assent to the premium named, by tender or otherwise, he met with an accident which rendered his life less insurable. It was held that the company were not bound to accept the premium or to issue a policy. In such cases the proposer must be held to warrant his state of health, not merely at the date of the proposal, but up to the date when the agreement to insure becomes binding; and, even apart from a warranty, he is bound to disclose any change of circumstances which may affect the risk.[6] This rule is sometimes expressly made a condition of acceptance.[7]

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[1] *M'Farlane* v. *Royal London Friendly Society*, 1886, 2 T.L.R. 755; *Wainwright* v. *Bland*, 1835, 1 Moo. & R. 481; *Macdonald* v. *National Mutual Life Association of Australasia*, 1906, 14 S.L.T. 173.

[2] *Evans* v. *Bignold*, 1869, L.R. 4 Q.B. 622; see also *Collett* v. *Morrison*, 1851, 9 Hare, 162; *Scott* v. *Roose*, 1841, Longfield and Townsend's Irish Reports, 54; *Hodson* v. *Observer Life Co.*, 1857, 8 El. & Bl. 40; *Williams* v. *Baltic Insurance Association of London*, [1924] 2 K.B. 282.

[3] See Representations and Warranties, para. 631 *et seq.*, *infra*.

[4] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977.

[5] 1886, 16 Q.B.D. 727.

[6] *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363; *Allis Chalmers Co.* v. *Fidelity and Deposit Co. of Maryland*, 1916, 114 L.T. (H.L.) 433.

[7] See *British Equitable Insurance Co.* v. *Great Western Rly. Co.*, 1869, 38 L.J. Ch. 314; *Looker* v. *Law Union and Rock Insurance Co.*, [1928] 1 K.B. 554.

629. If there is no express provision that the insurance is not to begin till the premium is paid, or till the policy is issued, or other suspensive condition, and if there is no term of the contract to which either party has not assented, an acceptance of a proposal for insurance, definite as to the risk and premium, would, it is thought, be held to constitute an agreement to undertake the risk as at the date of acceptance.[1] Even in that case the insurers would not be bound if the risk had terminated by the death of the person whose life it was proposed to insure before the agreement came to be carried out, but the insurer would be bound if there was merely an alteration of the risk. The distinction is the same as that between the effect, on a contract of sale, of the total destruction of the subject-matter of the contract before the transfer is made, and its partial destruction or deterioration. An acceptance of a proposal will also be binding on the company if the assured has assented to any conditions by which it is qualified, and if credit is given for the premium, either in accordance with the usual practice,[2] or by delivery of the policy without requiring payment.[3] Where a policy acknowledging receipt of the premium is prepared in terms of a proposal for insurance, and bears to be "signed, sealed, and delivered" as required by the company's deed of constitution, the mere fact that it remains in the custody of the company will not prevent its operating as a binding contract, when all its terms have been assented to by both parties.[4]

630. Any completed contract for the payment of a sum depending on a contingency connected with the duration of life, is a policy of life insurance under the definition in the Policies of Assurance Act, 1867,[5] and for the purposes of stamp duty.[6] The stamp is *ad valorem*.[7] A penalty of £20 is imposed upon "every person" who receives, or takes credit for, any premium or consideration for any insurance other than a sea insurance, and does not within one month after receiving, or taking credit for, the premium or consideration, make out and execute a duly stamped policy of insurance.[8] Apart from this provision there is no statutory requirement that a contract of insurance, other than a sea insurance, should be in writing. But, except in the case of reinsurance, a policy is always issued. In the construction of the policy the rule is well established, that where there is ambiguity the meaning most favourable to the assured is to be preferred.[9]

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[1] *Eames* v. *Home Insurance Co.*, 1876, 94 U.S. 621, at p. 626 *et seq.*

[2] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977, per Lord M'Laren at p. 987.

[3] *Kelly* v. *London and Staffordshire Fire Co.*, 1883, 1 Cab. & El. 47.

[4] *Xenos* v. *Wickham*, 1867, L.R. 2 H.L.C. 296.

[5] 30 & 31 Vict. c. 144, s. 7.

[6] Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 98.

[7] Sec. 97.

[8] Sec. 100.

[9] *Standard Life Assurance Co.* v. *Weems*, 1884, 11 R. (H.L.) 48, per Lord Watson at pp. 53, 54.

Section 4.—Representations and Warranties.

Subsection (1).—*Duty of Disclosure.*

631. The non-disclosure of any material fact by either of the parties to a policy of life insurance renders the contract voidable at the option of the other. The requirement of the law as regards *uberrima fides* is the same whether the insurance be life, fire, or marine.[1] The case of misrepresentation is *a fortiori* of concealment, and is a ground of rescission common to insurance and other mercantile contracts.[2] The misrepresentation or concealment need not be fraudulent; it is sufficient if it is material—that is, if the party misled would not have entered into the contract at all, or would not have agreed to its essential terms if he had known the true state of the facts.[3] The question whether a misrepresentation is material is a question of fact which may be the subject of expert evidence.[4] The right to rescind extends to the case of material error induced by the agent of either of the contracting parties, by misrepresentations or concealment, in the course of the negotiations. But the referees named by the insured, whether friends or medical attendant, are not his agents; nor is A. where he effects a policy on the life of X. responsible for statements made by X., unless he warrants their truth.[5]

Subsection (2).—*Warranties.*

632. These general rules are modified, in the case of life insurance policies, by the terms of the proposal and declaration, or of the policy. The proposal contains in writing the answers of the insured to inquiries by the company as to the insurability of the life, and these are usually accompanied by a declaration, signed by the insured, that his answers are true. The policy itself declares that the proposal and declaration shall be the basis of the contract, or incorporates them with the policy as part of the contract. The effect of either of these provisions is to make the answers of the insured warranties, and to exclude the question whether they are material.[6] The only question, therefore, which remains open under such a condition is what is the subject-matter of the warranty, a question of construction of the question and answer, and

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[1] See per Lord Blackburn in *Brownlie* v. *Campbell*, 1871, 5 App. Cas. 925, at p. 954; per Baron Parke in *Moens* v. *Heyworth*, 1842, 10 M. & W. 155, at p. 157; *Yorke* v. *Yorkshire Insurance Co.*, [1918] 1 K.B. 662, per M'Cardie J. at p. 667.

[2] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, per Lord Watson at p. 142; *Derry* v. *Peek*, 1889, 14 App. Cas. 337, per Lord Herschell at p. 359; *Davies* v. *London and Provincial Marine Insurance Co.*, 1878, 8 Ch. D. 469, per Fry J. at p. 474.

[3] *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 367; *Lindenau* v. *Desborough*, 1828, 8 B. & C. 586, per Bayley J. at p. 592; *Moens* v. *Heyworth*, 1842, *supra*; *Dalglish* v. *Jarvie*, 1850, 2 Mac. & G., per Baron Rolfe at p. 243.

[4] *London Assurance* v. *Mansel*, *supra*; *Yorke* v. *Yorkshire Insurance Co.*, *supra*, per M'Cardie J. at p. 670.

[5] *Wheelton* v. *Hardisty*, 1858, 8 El. & Bl. 232.

[6] *Anderson* v. *Fitzgerald*, 1853, 4 H.L.C. 484; *Dawsons Ltd.* v. *Bonnin*, 1922 S.C. (H.L.) 156.

of the relative declaration by the insured. If the statement is made in the proposal, and is explicit and unqualified, the insured must be held to warrant its truth in point of fact. Thus in the case of *The Standard Life Assurance Co.* v. *Weems*,[1] where the policy provided that the proposal and declaration should be the basis of the contract, and that the policy should be void if any answer given by the insured were untrue, the insured affirmed, in one of his answers, that he was temperate in his habits, and had always been so. It was held that the consideration whether the statement was made honestly by the insured, and was his *bona-fide* belief, was irrelevant, and that the sole question was whether the statement was true in fact.[2]

Subsection (3).—*Warranty of Good Health.*

633. The views expressed in the case of *The Standard Life Assurance Co.* v. *Weems* seem to go the length of holding that where the insured states in the proposal that he is free from disease, or is in good health, the warranty applies to latent disease as well as to disease of which he may be conscious.[3] In the case of *Life Assurance Co. of Scotland* v. *Foster* [4] the Court of Session adopted a less rigorous construction when the answer of the insured was given in reply to an inquiry, not in the proposal, but by the medical officer of the company. It was held that the terms of the answer, and the nature of the circumstances in which it was given, precluded the idea that the insured warranted her freedom from latent disease of which she was not aware.

Subsection (4).—*Waiver of Information.*

634. The duty of disclosure is not confined to matters which are the subject of specific inquiry in the proposal. It is not to be assumed that these are the only matters upon which the company desire information. In addition to answering fully what is asked, the proposer must disclose any material circumstance which, from its special nature, has not suggested itself as a subject of inquiry. In most forms of proposal there is a general question to meet special cases of this kind, requiring the proposer to state any other facts, in addition to those as to which specific inquiry has been made, which may render his life, or the life proposed for insurance, more than usually hazardous. If, however, the insured returns no answer to a written inquiry in the proposal, and the company accepts the proposal and issues a policy, it has been held in the Supreme Court of the United States that the company would be barred from

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[1] 1884, 11 R. (H.L.) 48, 9 App. Cas. 671.

[2] See also *Duckett* v. *Williams*, 1834, 2 Cr. & M. 348, cited and confirmed in *Standard Life Assurance Co.* (*Thomson*) v. *Weems*, *supra*.

[3] 9 App. Cas. 671, per Lord Blackburn at pp. 681, 682, and per Lord Watson at p. 690; but see per Lord Fullerton in *Hutchinson* v. *National Loan Fund Life Assurance Society*, 1845, 7 D. 467; and *Grattan* v. *Metropolitan Life Insurance Co.*, 1883, 44 Am. Rep. 472.

[4] 1873, 11 M. 351.

challenging the contract on the ground of concealment.[1] But where the insured's answer to any question, while *ex facie* complete, is imperfect and misleading, the concealment is one the materiality of which cannot be disputed where the proposal and declaration are made the basis of the contract.[2]

SUBSECTION (5).—*Indisputable Policies.*

635. Many modern policies are issued on the footing that they will not be challenged except on the ground of fraud. This is the effect of an express qualification in the declaration that the information given by the insured is true to the best of his knowledge and belief. Thus in *Wheelton* v. *Hardisty*,[3] a case of reinsurance, where the proposal by the company effecting the reinsurance referred, as regards certain of the inquiries, to the statements made by the life insured, and by the referees, in the original proposal to them, the declaration signed on behalf of the company contained the express qualification that the statements so incorporated were true to the best of their knowledge and belief. It was proved that in the statement by the life assured there were false and fraudulent averments, but it was held that the reinsurance could not be avoided by the falsity of these statements; the ground of the decision being (1) that the life insured was not the agent of the assured; and (2) that the declaration, qualified to an affirmation of belief, was not falsified unless it were shown that the person making it was aware of the fraud.[4] An affirmation of belief or opinion will, however, be deemed untrue, not only where the person making it is shewn to have had actual knowledge of the facts, but also where he has made statements recklessly, without knowledge of their truth or falsehood.[5]

636. In other cases, although a general warranty is given, certain of the answers are qualified by words limiting the particular statement to a statement of opinion or belief. Thus in the case of *Jones* v. *Provincial Insurance Co.*[6] the proposer stated, in answer to a question, "that he was not aware" of any circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous—a statement which, with the other answers in the proposal, was made the basis of the contract. It was held that the policy could not be avoided unless the information withheld related to a disorder which the assured not only knew of, but which he knew, or must have known, to be serious, and necessarily tending to shorten his life.

637. Another form of indisputable policy is one in which it is expressly agreed that the policy shall be void and the premiums forfeited if any of the statements in the proposal are false and fraudulent. On the principle of construction expressed by the maxim *expressio unius est exclusio alterius*, this is taken to mean that the policy is avoidable on

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[1] *Phœnix Life Insurance Co.* v. *Raddin*, 1887, 120 U.S. 183.
[2] *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363.
[3] 1858, 8 El. & Bl. 232.
[4] Contrast *Macdonald* v. *The Law Union Insurance Co.*, 1874, L.R. 9 Q.B. 328.
[5] *Pawson* v. *Watson*, 1777, Cowp., per Lord Mansfield at p. 788; *Derry* v. *Peek*, 1889, 14 App. Cas. 337, per Lord Herschell at p. 369.
[6] 1857, 3 C.B. (N.S.) 65.

the specified ground only, and not on any other ground.[1] This form of provision is not, however, so favourable to the assured as that just considered, where the policy is on the life of another, and the statements referred to are made by the life or the referees. False and fraudulent, when applied to certain statements, would appear to mean false and fraudulent on the part of the person making them—in the case supposed the life insured, and not the person to whom the policy is issued. On the other hand, if the policy is declared to be indisputable, the exception of fraud, whether expressed or implied, refers to fraud of the assured only, or of his agent to effect the insurance, and not to fraud of third parties, such as the referees or the life insured. At common law, as we have seen, the assured is not responsible for false statements by the life insured or by the referees, but he is responsible for innocent misstatements by himself, if actually material, or made by agreement the basis of the contract. On the latter account policies entirely unconditional are not so favourable to the assured as those expressly declared to be indisputable except for fraud, or containing provisions in other forms to the same effect.

638. Where the prospectus of a company contains a representation that all policies issued by the company shall be indisputable, except in the case of fraud, it has been held that the company cannot challenge a policy made on the faith of this representation or any other ground, even if the policy contain express provisions rendering it voidable for innocent misrepresentations.[2]

Subsection (6).—*Ambiguous Provisions.*

639. If the terms of the declaration and policy leave it doubtful whether an absolute warranty is intended, the construction most favourable to the insured will be adopted. Thus in *Fowkes* v. *Manchester Co.*[3] the policy contained a proviso that it should be void and the premiums forfeited (1) if any statement in the declaration was untrue, and (2) if the assurance had been effected through any wilful misrepresentation, concealment, or false averment. The policy incorporated the declaration and proposal as part of the contract. The declaration contained the provision that "if it shall hereafter appear that any fraudulent concealment or designedly untrue statement shall be contained herein, the premiums paid shall be forfeited and the policy void." It was held that, taking the policy and declaration together, the assurance was not avoided by a statement false in fact, but not designedly untrue.[4] On the other hand, an answer literally true may be untrue in substance and so operate as a breach of warranty.[5]

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[1] *Fowkes* v. *Manchester Co.*, 1863, 3 B. & S. 917.

[2] *Wood* v. *Dwarris*, 1856, 11 Exch. 493; *Wheelton* v. *Hardisty*, 1858, 8 El. & Bl. 232.

[3] 1863, 3 B. & S. 917.

[4] See also *National Bank* v. *Hartford Fire Insurance Co.*, 1877, 95 U.S. 673; *Fitch* v. *American Popular Life Insurance Co.*, 1875, 17 Am. Rep. 372.

[5] *Condogianis* v. *Guardian Assurance Co.*, [1921] 2 A.C. 125.

Subsection (7).—*Personal Bar.*

640. The right to avoid a policy of insurance on the ground of concealment or misrepresentation is subject to certain limitations founded on the doctrines of personal bar and agency. Thus a failure on the part of the assured to communicate facts which the agent of the company, making out and receiving the proposal for insurance, knows, or ought to know, will not avoid the insurance. Nor can the insurer found upon a misrepresentation, or even a breach of warranty, as a ground of rescission, if his agent knew when the policy was issued the true state of the facts, or if, in knowledge of the facts, the company has, by its actings, treated the contract as subsisting.[1] But a mere suspicion on the part of the company that fraud has been used to induce the contract, or that one of the conditions of the contract has been broken, does not in general impose on the company an immediate duty to investigate and challenge.[2] The fact that a policy is in the hands of an assignee is not a defence to a plea that it was obtained by misrepresentation or concealment by the original holder. Any ground for rescission pleadable against the original holder is pleadable against the assignee.[3] But if the company consent to the assignment, or receive a notice of assignment without objection, this will amount to a waiver of any right of challenge known to the company at the date of the assignment.[4]

Section 5.—The Premium.

Subsection (1).—*Condition as to Time.*

641. When the insurance is conditioned on the payment by a fixed date of the premiums, the condition is strictly enforced.[5] It is not an excuse that the assured was prevented by sickness or by death from paying the premium in time. The necessity for strict compliance with this condition may, however, be waived by the company either expressly, or by such acts or conduct on the part of its responsible officials as justify the assured in assuming that strict compliance will not be required.[6] Nor will the forfeiture be incurred if the delay in payment is due to some act or omission of the company. When, for instance, a company is in the habit of giving notice that renewal premiums are due, policy-holders may be justified in assuming that such notice will be given, and their policies not invalidated, in the absence of notice,

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[1] *Cruickshank* v. *Northern Accident Insurance Co.*, 1895, 23 R. 147; *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Wing* v. *Harvey*, 1854, 5 De G.M. & G. 265; *Donnison* v. *Employers' Accident and Live Stock Insurance Co.*, 1897, 24 R. 681.

[2] *Scottish Equitable Life Assurance Society* v. *Buist*, 1877, 4 R. 1076, 1081; affd. 5 R. (H.L.) 64; and note 17 Am. St. Rep. 247.

[3] *Scottish Equitable Life Assurance Society* v. *Buist, supra.*

[4] *Hale* v. *Union Mutual Fire Insurance Co.*, 1855, 64 Am. Dec. 370.

[5] *Phœnix Life Co.* v. *Sheridan*, 1860, 8 H.L.C. 745; *Liquidator of Employers' Insurance Co. of Great Britain* v. *Benton*, 1897, 24 R. 908.

[6] *Eggleston*, 1877, 96 U.S. 572, 579; *Union Central Life Assurance Co.* v. *Pottker*, 1878, 31 Am. Rep. 555.

by failure to pay the premium within the term fixed in the policy.[1] On the same principle, if the assured has agreed with the company that the annual share of the profits or dividends to which he is entitled shall be deducted from the annual premium, and if the usual practice of the company is to give notice to the assured of the balance of the premium due after the profits have been deducted, the company cannot avail itself of a forfeiture for non-payment of the premium within the time stipulated in the policy if it has failed to give the usual notice, and has returned no answer to a request for information by the assured as to the amount due until after the time for payment has elapsed.[2] But the mere fact that the company has not given notice that the premium is due is not sufficient to imply a waiver of the condition. There must be a positive representation that the premium has been paid, or some promise, actual or implied from a course of dealing, that notice will be given. In the case of *Simpson* v. *Accidental Death Insurance Co.*[3] the company intentionally refrained from giving notice to the executors of the assured that the last premium due before his death had not been paid. This information was only communicated after the days of grace allowed for the payment of the premium had expired, within which period the assured had died. The Court held that the company was not precluded, by its failure to give the information in question, from pleading non-payment of the premium within the stipulated time, and from repudiating liability upon the policy. In order to prevent the assured founding upon a uniform practice to give notice, it is usual for insurance companies, in intimating that a renewal premium is about to fall due, to state that the company is not bound to give such intimation, and that the want of it is not to be taken as an excuse for non-payment.

Subsection (2).—*Powers of Agents.*

642. In the case of industrial offices payment of the premiums is usually made to local agents; but such agents are not presumed to have any authority to waive any forfeiture in the policy, or to receive premiums after a forfeiture has been incurred. The assured is not entitled to rely upon any undertaking given by the agent on the part of the company, unless he is satisfied that the agent has authority to bind the company. Such authority may be shewn either to be contained in the written instructions to the agent, or it may be implied from the fact that the agent is in practice allowed by the company to exercise it.[4] In this country the agent's authority is not presumed to include a power of entering into contracts on behalf of the company, or

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[1] *Eggleston*, 1877, 96 U.S. 572, 579.

[2] *Meyer* v. *Knickerbocker Life Insurance Co.*, 1878, 29 Am. Rep. 200; *Eddy* v. *Phœnix Mutual Life Insurance Co.*, 1888, 23 Am. St. Rep. 17, note by reporter.

[3] 1857, 2 C.B. (N.S.) 257.

[4] *Montreal Assurance Co.* v. *M'Gillivray*, 1859, 13 Moo. P.C. 119–124; *Union Central Life Insurance Co.*, *supra*; *Knickerbocker Life Insurance Co.* v. *Norton*, 1877, 96 U.S. 234.

of binding the company by receipt of a premium when it is overdue.[1] If such authority is averred by the assured against the company, the onus of proof is upon him.[2]

643. In the cases of *Acey* and *Ward*[1] the actings of the agent were held to be outwith the scope of his authority, and the company was accordingly not bound. But the result will be different if what is done by the agent is within the scope of his duties. Thus in *Wing* v. *Harvey*[3] the policy contained a condition that if the assured went beyond the limits of Europe without the licence of the directors, the policy should become void. The life insured had, in breach of this condition, gone to reside in Canada, but it was proved that this fact had been communicated by the assignee of the policy to the agent of the company authorised to receive the premiums, and that, subsequently to this communication, premiums had been accepted by the agent from the assignee. It was held that the breach of condition could not be pleaded by the company; that it was the duty of the agent to have communicated to the head office the circumstances under which the premium had been paid to and accepted by him; and that his failure to forward this information could not be allowed to prejudice the assured. The company was held to be aware of what was communicated to its agent, and in that knowledge to have accepted the premium, and thereby to have elected to treat the contract as binding. On the same principle, an insurance company will be held to be aware that an overdue premium handed to its agent has not been paid in time, and if subsequently it receives the premium next due, or does other acts which would imply a waiver of the forfeiture, if done in knowledge that the forfeiture had been incurred, the company will be precluded from saying that it was ignorant of what its agent knew, although he may have neglected his duty in not communicating the facts to it.

644. A local agent who is authorised to receive premiums when due, but who has no authority to contract on behalf of the company, or to alter or change any condition of the policy, or to waive any forfeiture, cannot bind the company by accepting less than the whole of a premium, unless the company homologates his act and receives the premium when forwarded; and the custom of the company to charge the advance premium to the agent on issuing a policy is not a payment, unless so understood between the agent and the insured—that is to say, unless the agent has undertaken to advance the premium for the assured.[4]

645. According to the rule laid down in England, an agent, like any third party, may advance the premiums at the request of all the parties

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[1] *Acey* v. *Fernie*, 1840, 7 M. & W. 151, approved in *London and Lancashire Assurance Co.* v. *Fleming*, [1897] A.C. 499; *British Industry Life Assurance Co.* v. *Ward*, 1856, 17 C.B. 645.

[2] *Linford* v. *Provincial Horse Insurance Co.*, 1864, 34 Beav. 291; *North British Insurance Co.* v. *Barker*, 1833, 6 W. & S. 323; *Union Mutual Life Insurance Co.* v. *Mowry*, 1875, 96 U.S. 544.

[3] 1854, 5 De G.M. & G. 265.

[4] *Brown* v. *Massachusetts Mutual Life Insurance Co.*, 1879, 47 Am. Rep. 205.

interested in the policy, and by doing so acquire a lien upon the policy.[1] In Scotland it is thought that a bond upon the policy would be necessary to give a lien.

SUBSECTION (3).—*Days of Grace.*

646. It is usual to allow a certain period, after the date of payment fixed in the policy, as days of grace within which the premium may be paid. The forms of this provision differ in different policies, but there would seem to be only two possible constructions. The effect of the provision is either to keep the insurance in force during the days of grace, or merely to provide that the policy may be renewed during the days of grace for another period, upon the same conditions as before, and without further examination as to health. The first form of condition usually expressly provides that the premium may be paid during the days of grace, and that the insurance shall continue in force till their expiry. Under this condition the insurance runs on from one period to the next without any break, if the premium be paid within the specified period, and the company would be liable, although the insured died within the days of grace before tender of the premium.

647. The other form of condition is usually expressed negatively, and provides that the policy shall be void if the premiums for renewal are not paid within the specified period. Under such a condition, the premium must be paid, not only within the days of grace, but also within the lifetime of the person whose life is insured, so that if the life fall within the days of grace, before the premium is paid or tendered, the insurers are not afterwards obliged to receive it, or to pay the sum in the policy under deduction of the premium.[2] The same principle applies as in the case of the original contract; it is a mere agreement to renew, which cannot be enforced if, when it comes to be fulfilled, there is no longer a life in existence to insure.[3] The effect of the condition is not to continue the insurance in force, but to give the insured the right of renewing the policy within the period specified, although his life has become less insurable.[4] It may, however, be doubted if any insurance company—in this country at least—continues to have a policy condition of this kind.

648. Most policies, besides providing for days of grace, contain a further condition that if the assured fails to pay the renewal premium within the days of grace, the policy may be revived within a certain further period, on satisfactory proof of the health of the assured, and on payment of a certain fine. If the company, without making any inquiries as to the health of the assured, renews the policy, in ignorance of the fact that the assured is dead, it is not bound, because the renewal,

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[1] *In re Leslie; Leslie* v. *French*, 1883, 23 Ch. D. 552; *Falcke* v. *The Scottish Imperial Insurance Co.*, 1886, 34 Ch. D. 234.

[2] *Want* v. *Blunt*, 1810, 12 East, 183.

[3] *Sickness and Accident Assurance Association* v. *General Accident Assurance Corporation*, 1892, 19 R. 977.

[4] *Pritchard* v. *Merchants Co.*, 1858, 3 C.B. (N.S.) 622, opinion of Willes J. at p. 642.

like the original policy, presumes the existence of a living person as the subject of the insurance.[1]

649. It is usually provided in modern policies that a failure to pay the renewal premiums within the days of grace, or the further period provided in the condition just dealt with, shall not forfeit all benefit under the policy. These concessions either take the form that the policy will be renewed, on proof that the assured's state of health is not impaired, and on payment with interest of overdue premiums, or that the surrender value of the policy will be paid or applied, if sufficient for that purpose, to the payment of the overdue premiums, such payment to become a first charge upon the proceeds of the policy. Sometimes the surrender value is defined, as, for instance, when the engagement is to pay such proportion of the sum insured by the lapsed policy as the premiums paid bear to the total premiums due on the policy. These conditions are sometimes merely permissive, and are taken *verbatim* from the articles of association or deed of settlement of the company, and are merely inserted for the information of the assured. In other cases they take the form of an obligation binding on the company, which the insured could enforce.

Section 6.—Excepted Risks.

Subsection (1).—*Residence.*

650. Certain risks are excepted from most life policies, either in respect of local limits for the residence of the life insured, or of his occupation, or of the cause of his death. Under the first of these exceptions it is provided that the insurance shall be either suspended or avoided if the insured shall reside or travel within the areas specified. When this provision creates a forfeiture, it will be strictly enforced, and a residence, however short or whatever its cause, will avoid the policy.[2] It is usually provided, however, that this restriction may be removed upon payment of an extra premium, and, if the policy has been assigned, that it shall not be avoided, if the assignee, as soon as he becomes aware that the condition has been transgressed, informs the office of the fact, and pays the extra premium which may be demanded.

Subsection (2).—*Occupation.*

651. Among proscribed occupations are military service, seafaring, the preventive service, gold searching, and the liquor traffic. Policies generally give express intimation that these occupations may be engaged in without avoiding the policy if licence is obtained from the directors, and an extra premium paid. Military service implies that the assured shall be subject to military law, and a mere clerk or servant attached

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[1] *Pritchard* v. *Merchants Co.*, 1858, 3 C.B. (N.S.) 622.

[2] *Beacon Life and Fire Assurance Co.* v. *Gibb*, 1862, 1 Moo. P.C. (N.S.) 74, per Lord Chelmsford at p. 100 ; see also *Sparenborg* v. *Edinburgh Life Assurance Co.*, [1912] 1 K.B. 195.

to the War Office or to the Army is not a military servant in the sense of the exception.

SUBSECTION (3).—*Cause of Death.*

652. In regard to the third class of exceptions, those depending on the cause of death, the provision usually is that if the assured shall commit suicide, or die by duelling or by the hand of justice, the policy shall be void. It has been held that the expressions "suicide," "self-destruction," or "dying by his own hand," in a clause excepting risks from a policy, have the same meaning, but none of these expressions is construed as including every possible case in which a man takes his own life when, for instance, he takes his life during delirium or during an epileptic fit, or when he is under an insane delusion as to the instrument which he has in his hands, and supposes it to be something harmless. In construing any of the expressions, the English rule is that the exception applies when the person dying by his own hand is aware of the physical consequences of his act, although his reason may be so impaired that he is not aware of its moral consequences. In other words, the condition applies when the insured takes his life voluntarily, although at the time he may be of unsound mind. If, on the other hand, the unsoundness of mind is such as to confuse the senses, or to produce a state in which voluntary action is impossible, the condition does not apply. This construction is established in two leading cases.[1] The rule that if the assured does the act which occasions his death not voluntarily, but through confusion of the senses, the exception will not apply, is laid down in *Stormont* v. *Waterloo Life Co.*[2] In America a different rule of interpretation is adopted. If the insured kills himself when insane, the act is not regarded as a case of "suicide," or "self-destruction," or "dying by his own hand," within the meaning of these words in a clause excepting risks from a policy, even if the assured understood and intended the physical act by which life was destroyed.[3]

653. On the principle of the cases decided in this country on the exception of suicide, it would seem that the exception of death by the hand of justice would include a case when the insured was innocent of the crime for which he suffered, and it would exclude a case where he was executed by accident, or where he was mistaken for someone else.

SECTION 7.—ASSIGNATION OF POLICIES.

SUBSECTION (1).—*Policies of Assurance Act*, 1867.

654. The assignation of policies of life insurance is regulated by the Policies of Assurance Act, 1867.[4] The Act provides that any person

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[1] *Borradaile* v. *Hunter*, 1843, 5 Man. & G. 639; *Clift* v. *Schwabe*, 1845, 2 C. & K. 134; 3 C.B. 437.

[2] 1858, 1 F. & F. 22.

[3] *Connecticut Mutual Life Insurance Co.* v. *Akens*, 1893, 150 U.S. 468.

[4] 30 & 31 Vict. c. 144.

or corporation becoming entitled, by assignment or other derivative title, to a policy of Life Assurance, and possessing, at the time of action brought, the right in equity to receive and the right to give an effectual discharge to the assurance company for moneys thereby assured or secured, shall be at liberty to sue at law in their own name to recover such moneys. An assignee is not entitled to sue on a policy until a written notice of the date and purport of the assignment shall have been given to the assurance company at its principal place of business for the time being, or in case it has two or more principal places of business, then at some one of such principal places of business, either in England, or Scotland, or Ireland. The date on which such notice is received is to regulate the priority of all claims under any assignment; and a payment *bona fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if the Act had not been passed. The Act provides further that every assurance company shall, on every policy issued by it, specify its principal place or principal places of business at which notice of assignment may be given.

655. An assignment may be made either by endorsement on the policy or by a separate instrument in the words or to the effect set forth in the schedule to the Act, such endorsement or separate instrument being duly stamped. Upon the request in writing of any person by whom notice is given or signed, or of his executors or administrators, and upon payment of a fee not exceeding five shillings, the company must deliver an acknowledgment in writing under the hand of its manager, secretary, treasurer, or other principal officer of its receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurance company of its having duly received the notice to which such acknowledgment relates.

656. The question of the right to a policy of life insurance on assignment may obviously arise between different parties:—between the assignor and the assignee; between different assignees; between the assignee and an arrester or a trustee in sequestration; or, lastly, between the assignee and the insurance company. It is to the last case—the conditions under which an assignee has a right to demand payment from the company on his own receipt and to sue upon the policy in his own name—that the above statutory provisions are applicable.[1]

Subsection (2).—*Assignment must be in Writing.*

657. For an assignment to have this effect there are four conditions requisite. The first requisite is that the assignment should be in

[1] *Newman* v. *Newman*, 1885, 28 Ch. D. 674, at p. 680.

writing, either separate or indorsed on the policy (s. 3). In England deposit of the policy, in consideration of an immediate advance, constitutes an equitable mortgage, and, like the Scottish assignation, gives the assignee a valid right as against the assignor and his representatives, although in both countries intimation of the assignment is necessary to the completion of a valid title in a question with other assignees. In Scotland an obligation or debt, such as a policy of insurance, cannot be assigned by a transfer of the document of title. In *The United Kingdom Life Assurance Co.* v. *Dixon*,[1] it was held that a deposit of a policy conferred no right upon the holder, or those claiming through him, to the contents of the policy, in competition with an executor of the assignor who had made up a title by confirmation. It matters nothing that the possessor of the policy has paid all the premiums.[2] But an assignation, although not intimated to the company until after the death of the cedent, is valid against the executor.[3]

658. In England, although the deposit of a policy gives a valid right against the assignor, it does not give the assignee any right, under the Act of 1867, to sue in his own name or to discharge the company, even if the conditions as to notice of the assignment required by that Act are fulfilled. The company is therefore not bound, and is not in safety, to pay to one who holds as a mere depositary, and has no written title, even if it has no notice of other claims, and no representatives of the assured have made up a title. In such a case an application to the Court is necessary to secure for the company a valid discharge, unless the representatives of the assured make up a title and concur in the discharge by the holder of the policy. The necessity for an application to the Court, therefore, arises when the representatives have no interest to make up a title and refuse to do so. In that case the costs of the necessary proceedings to obtain a valid discharge must be paid by the holder of the policy. Nor is the company liable for interest upon the sum due under the policy till the date of the decree authorising it to pay. It is only when a debtor is in default in not paying at a certain date that he is liable in interest. He is not in default until the person claiming payment is in a position to give him a valid discharge. These rules were laid down in the cases undernoted.[4]

Subsection (3).—*Right to Grant Discharge.*

659. The second requisite is that the title under which the assignee holds should, either expressly or by implication, give him power to discharge the company on payment to him of the sum due in the policy (s. 1).[5] If the assignment is absolute, such a power is implied; and in England, by statute, where a mortgage is in writing, and subsequent

[1] 1838, 16 S. 1277.
[2] *Wylie's Exrx.* v. *M'Jannet*, 1901, 4 F. 195.
[3] *Brownlee* v. *Robb*, 1907 S.C. 1302.
[4] *Crossley* v. *City of Glasgow Life Assurance Co.*, 1876, 4 Ch. D. 421; *Webster* v. *British Empire Mutual Life Assurance Co.*, 1880, 15 Ch. D. 169.
[5] *Tench* v. *Eykyn*, 1886, 18 L.R. Ir. 45.

to the Conveyancing Act of 1881, a clause to this effect is also implied; but this provision does not extend to Scotland, and therefore it is advisable that the clause should be expressed in Scottish assignations in security.[1] By the English Conveyancing Act, 1881,[2] a trustee's discharge is also made sufficient, and by the Trusts (Scotland) Act, 1921,[3] trustees falling within the provisions of the Act are empowered, *inter alia*, "to uplift, discharge, or assign debts due to the trust estate," unless such acts are at variance with the terms or purposes of the trust.

660. The English Conveyancing Act of 1881 also authorises a mortgagee to sell the security in the same way as if the mortgage deed contained a power of sale, provided a contrary intention is not expressed.[4] This provision only applies to mortgages by deed, and subsequent in date to the commencement of the Act. In Scotland there is no statutory power of sale, and the right either to sell or surrender the policy must be conferred by the mortgage deed. In the case of trusts, the Act of 1921 authorises the trustee to apply to the Court for power to sell, even when such power is at variance with the terms of the trust, on satisfying the Court that it is expedient for the execution of the trust so to do.[5] Where these statutes do not apply, and where no special mandate to sell or surrender is conferred by the deed creating the trust or mortgage, the discharge, to be valid, must be concurred in by all the parties interested. Sometimes this authority is conferred by a condition in the policy itself. Such a condition provides that "the holder of the policy as mortgagee or trustee may (unless to the knowledge of the company he is prohibited from doing so by the terms of his mortgage or trust) surrender the policy to the company for cash or any other consideration, and such surrender, so made, shall effectually discharge the company from liability under the policy after the date of such surrender."

SUBSECTION (4).—*Intimation.*

661. The third requisite of a complete title in the assignee is that notice of the assignment should be given in writing to the head office of the company (s. 3). Almost no change is made by this section upon the law of Scotland; notice of the assignment of a debt always required to be given to the debtor or holder of the fund assigned, and the priority of claims by different assignees upon the fund depended upon the date of notice. Intimation is necessary to give a real right to the subject assigned, but an assignment of a policy of insurance, like any other deed purporting to give a contract right, is binding on the grantee and his heirs and executors, even without intimation to the insurance company before the death of the cedent.[6] Prior to the Act, notice might have been given in various ways; now, the method prescribed by statute must be followed where the question is one with the insurance

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[1] 44 & 45 Vict. c. 41, s. 22; Bell, Convey. i. 331.
[2] 44 & 45 Vict. c. 41, s. 36.
[3] 11 & 12 Geo. V. c. 58, s. 4*b*.
[4] 44 & 45 Vict. c. 41, s. 19.
[5] 11 & 12 Geo. V. c. 58.
[6] *Brownlee* v. *Robb*, 1907 S.C. 1302.

company. There is no decision on the question what constitutes "written notice of the date and purport of the assignment," but it is thought that intimation in one or other of the methods prescribed by the Transmission of Moveable Property (Scotland) Act, 1862,[1] would fall within these terms. Under that Act, which is expressly made applicable to the assignation of policies of assurance issued by Scottish companies, intimation may be given by the transmission to the company of a certified copy of the assignation. The company would thus receive intimation in writing of the date and purport of assignation, which is all that is required by the Act of 1867.

662. Section 6 of the Act provides that the company shall duly acknowledge notice of an assignment. It has been held that verbal notice of an assignment is not sufficient to give a claim against the company in competition with that of an assignee who had given notice in terms of the Act.[2] The company is entitled to disregard the verbal notice, and pay to the assignee who has fulfilled the conditions required to complete his title and give a valid discharge. On the other hand, when the company has a written notice of a prior incumbrance, it is not bound or entitled to pay to a subsequent assignee from the assured, although no claim is made by the first assignee. The claimants under the second assignment are bound to shew that the prior incumbrance has been satisfied or discharged. A mortgagee giving notice in terms of the Act is entitled to sue in his own name, and therefore the company would not be safe in paying to a subsequent assignee. Nor is the company bound to find out the state of the prior incumbrance. The expense of making his title clear, by shewing that the prior incumbrance has been discharged, must be borne by the claimant.[3]

663. The provision as to priority of notice in s. 3 of the Act only applies in regard to questions with the company. Questions of priority between assignees and questions of competition of diligence are determined by the common law. Hence, when a first incumbrancer on a policy had failed to give notice in terms of the Act, it was held that a second incumbrancer, who knew of the first incumbrance, could not, in a question with the prior incumbrancer, acquire a preference by giving written notice to the company.[4]

664. Confirmation of a trustee in a sequestration operates as an intimated assignation of all debts due to the bankrupt,[5] and therefore an insurance company is not in safety in paying to an assignee of the bankrupt in terms of a notice subsequent to the trustee's confirmation. A different rule prevails in England under the present English Bankruptcy Act.[6] But in Scotland the company must ascertain, before paying under an intimated assignment, whether the assignor is bankrupt.

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[1] 25 & 26 Vict. c. 85, s. 2.
[2] *In re Young*, 1890, 25 L.R. Ir. 372, 386.
[3] *In re Haycock's Policy*, 1876, 1 Ch. D. 611.
[4] *Newman* v. *Newman*, 1885, 28 Ch. D. 674, 680.
[5] 3 & 4 Geo. V. c. 20, s. 97.
[6] 1883, 46 & 47 Vict. c. 52, ss. 20, 43, 44, 54; *Palmer* v. *Locke*, 1881, 18 Ch. D. 381.

SUBSECTION (5).—*Stamp.*

665. In the fourth place it is requisite that the assignment should be properly stamped. The Stamp Act, 1891,[1] provides that no assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless such assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped. If any payment is made in contravention of this enactment, the person by whom payment is made is liable for the stamp duty and also the penalty payable on stamping the assignment.[2] The proper stamp depends on the purpose of the assignment—whether it is on sale, in security, or contains a declaration of trust. In each of these three cases a different stamp is required. The company is bound to see not only that the last assignment, in respect of which the claim is made, is stamped, but that all intermediate assignments, forming the chain of the assignee's title, are duly stamped. Of course if a prior mortgage of the policy has been discharged, so that it does not form a link in the assignee's title, it would not be necessary, in a question with that assignee, that it should be stamped.

SECTION 8.—SETTLEMENT POLICIES.

SUBSECTION (1).—*Trust Created by Policy.*

666. A trust may be declared in a life policy by making it payable to A. as trustee for the purposes set forth. Such a trust is not, at common law, effectual against creditors unless the policy is delivered to the trustee;[3] but a destination to trustees named in the policy will be given effect to in a competition with the executor of the assured, even if the policy is not intimated to the trustees.[4]

SUBSECTION (2).—*The Married Women's Policies of Assurance Act.*

667. Special provision is made in regard to such policies by the Married Women's Policies of Assurance (Scotland) Act, 1880,[5] where the policy is effected (1) by a wife for her separate use or (2) by a husband for the benefit of his wife or children. The Act provides (s. 1) that a wife can effect a policy without her husband's consent, and deal with it as her separate estate exclusive of the husband's *jus mariti* or right of administration. A policy effected for the benefit of the wife or children of the assured is made equivalent to a delivered trust, and is protected against attack on the allegation that it is a donation to the wife, or on the ground of insolvency, except to the limited extent provided in the

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[1] 54 & 55 Vict. c. 39, s. 118. [2] See Alpe's Law of Stamp Duties, 1929, p. 288.
[3] *Jarvie's Tr.* v. *Jarvie's Trs.*, 1887, 14 R. 411.
[4] *Dickie's Trs.* v. *Dickie*, 1892, 29 S.L.R. 908. [5] 43 & 44 Vict. c. 26.

proviso of the section (s. 2).[1] This enactment in both its branches is now in the main superseded by the Married Women's Property (Scotland) Act, 1920,[2] which abolishes the husband's curatory and makes donations between husband and wife irrevocable by the husband or by his creditors if completed a year and a day before his sequestration.

(i) *To Whom Policy may be Issued.*

668. The Married Women's Policies of Assurance (Scotland) Act, 1880, extends to foreigners.[3] It has been held that the words "any married man" include a widower, and that a policy effected for the benefit of his children by a widower is an effectual trust under the Act.[4] A policy effected by an unmarried man for the benefit of a future wife or children would probably be held on marriage to fall within the Act. If a policy issued to an unmarried man on his own life is exchanged on marriage for a policy under the statute, it is thought that it would not be a valid objection on the part of his creditors that credit had been given by the company, in effecting the new policy, for past premiums.[5] Similarly, it would seem that the benefit of the Act may be extended to a future second wife, and the issue by her; but if the policy is effected by a married man "for the benefit of his wife," his wife at the time will be meant.[6] To include a future wife, such words as "any surviving wife" would have to be used.

669. The fact that the destination in the policy includes a destination-over, in the event of the failure of the wife and children of the assured, does not deprive the latter of the benefit of the statute.[7] On the same principle, it would seem that an endowment policy, *i.e.* a policy payable on the death of the assured, or on his attaining a specified age, would, until the assured reaches the age specified, be an effectual trust under the Act for his wife and children.[8]

(ii) *Dealings with Policy during its Currency.*

670. Although a policy may be surrendered, as was done in the case of *Schumann*,[9] it must, if not absolutely necessary for protection of the trust, be for purposes not inconsistent with it.[10] It would not be incompetent to grant an assignation of the policy for purposes ancillary to the trust. To grant an assignation, however, to the creditors of the husband for an antecedent debt is invalid, as in effect it revokes the

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[1] See *Galloway* v. *Craig*, 1860, 22 D. 1211; 1861, 4 Macq. 267; *Smith* v. *Kerr*, 1869, 7 M. 863; *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227.

[2] 10 & 11 Geo. V. c. 64.

[3] *Schumann* v. *Scottish Widows' Fund Society*, 1886, 13 R. 678.

[4] *Kennedy's Trs.* v. *Sharpe*, 1895, 23 R. 146.

[5] Cp. *Holt* v. *Everall*, 1876, 2 Ch. D. 266.

[6] See *In re Seyton; Seyton* v. *Satterwaite*, 1887, 34 Ch. D. 511.

[7] *Dickie's Trs.* v. *Dickie*, 1892, 29 S.L.R. 908.

[8] *Chrystal's Trs.* v. *Chrystal*, 1912 S.C. 1003.

[9] *Schumann* v. *Scottish Widows' Fund Society*, *supra*.

[10] *Barras* v. *Scottish Widows' Fund Society*, 1900, 2 F. 1094.

trust.[1] *Stante matrimonio* the wife has no power to discharge the trust in her favour created by the policy,[2] and the husband cannot revoke the trust created by the policy, or put his wife to an election between taking a provision in his will and the amount of a policy taken out for her, because the latter is not a part of his estate.[3] Just as in the case of ordinary policies, it may become necessary to realise the fund created by policies under the Act during their currency. The Act imposes no obligation upon the assured to pay the premiums of insurance, and he may become unable to do so by change of circumstances. Should realisation become necessary, three possible courses would seem to be available to preserve the trust fund. The policy may either be surrendered for cash, or for a paid-up policy of less value, or money may be borrowed on the security of the policy to meet the premiums still due.

671. In regard to the first of these courses, it has been held that the company is entitled to grant a surrender for cash upon the joint receipt of all the beneficiaries, including the assured himself, who has the reversionary interest, and of the trustee, who may be either the insured or a trustee specially appointed in terms of the Act. This was decided in a case where the insurance was effected by a husband on his own life, for the benefit of his wife as sole beneficiary, and when both the husband and wife concurred in the receipt for the surrender value.[4] In the same case, Lord Shand expressed the opinion that the words of the section, "and the receipt of such trustee for the sums secured by the policy or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the insurance office," were intended, *inter alia*, to meet the case of a surrender before maturity of the policy for cash, and that the receipt of the husband as trustee would have been itself a sufficient discharge without the concurrence of the wife, provided the insurance office had no notice of a contemplated breach of trust. It may, however, be doubted whether the Act contemplated a surrender of the policy for cash to the assured himself as trustee, because he occupies the position both of a trustee and of a truster with a reversionary right in the events of the objects of the trust becoming incapable of being carried out.[5] For these reasons it seems advisable, if it is necessary to realise the fund for the immediate use of the beneficiaries, that the company should require that an independent trustee should be appointed to administer the trust in accordance with the purposes expressed in the policy. Otherwise the second course should be adopted, and the surrender, if made to the insured himself, should take the form of a surrender for a paid-up policy, subject to the original trust.[6]

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[1] *Edinburgh Life Assurance Co.* v. *Balderston*, 1909, 2 S.L.T 323 ; *Scottish Life Assurance Society* v. *John Donald, Ltd.*, 1901, 9 S.L.T. 200. See also *Hay's Trs.* v. *Hay*, 1904, 6 F. 978, per Lords Young and Moncreiff.

[2] *Barras* v. *Scottish Widows' Fund Society*, 1900, 2 F. 1094 ; *Scottish Life Assurance Society* v. *John Donald, Ltd.*, *supra*.

[3] *Hay's Trs.* v. *Hay*, 1904, *supra*.

[4] *Schumann* v. *Scottish Widows' Fund Society*, 1886, 13 R. 678.

[5] *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, at p. 154.

[6] *Schultze* v. *Schultze*, 1887, 56 L.J. Ch. 356.

672. As regards the third method suggested, the rule has been laid down in England that a trustee may advance the premiums of insurance and so acquire a lien upon the policy, or he may borrow money for this purpose and transfer his lien to the lender. The lender will also acquire a lien if he advances money for this purpose at the request of all the beneficiaries.[1] An insurance company would therefore be entitled, if such a course were thought more advisable than surrender, to advance the premiums still due on the security of the policy at the request of the trustee. If there is no independent trustee other than the husband, the safer course would be to obtain the concurrence of all the beneficiaries.

(iii) *Fraud on Creditors.*

673. Under the proviso of s. 2 it has been held that if the premiums on a policy on the husband's life are paid by the wife, the creditors of the husband cannot claim repayment of them.[2]

(iv) *To Whom Proceeds Payable.*

674. Payment of the policy should only be made to the trustees duly appointed, or, failing such appointment, to the executors of the assured. The trustees must be appointed with special reference to the policy; a general nomination of trustees in a settlement is not sufficient. The funds fall to be administered by the executors of the assured in preference to testamentary trustees.[3] In no case should the payment be made to the beneficiaries directly, as the trustee, or the executor if there is no trustee, may have claims on the policy—for expenses or charges connected with the trust, or may have notice of assignments of, or charges on, the interests of the beneficiaries.

(v) *Division Among Beneficiaries.*

675. Sec. 2 provides that the trust shall be "for the purpose or purposes so expressed," *i.e.* expressed on the face of the policy. It is therefore necessary that the purposes of the trust shall be specifically set forth in the policy itself, and not by reference to any separate deed. In order to do this properly, the trust should state the respective rights of the wife and children in the fund provided. If the trust is expressed to be for the benefit of wife and children, it has been held in England (after some conflict of decision, and only by Courts of first instance) that the fund is to be equally distributed among the wife and children, each taking an equal share.[4] The same rule was stated by Lord M'Laren in the Outer House in *Jarvie's Tr.* v. *Jarvie's Trs.*[5] In the Inner

[1] *In re Leslie; Leslie* v. *French*, 1883, 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.*, 1886, 34 Ch. D. 234; *Borthwick* v. *Scottish Widows' Fund Society*, 1864, 2 M. 595.

[2] *Holt* v. *Everall*, 1876, 2 Ch. D. 266. [3] *Kennedy's Trs.* v. *Sharpe*, 1895, 33 S.L.R. 89.

[4] *In re Seyton; Seyton* v. *Satterwaite*, 1887, 34 Ch. D. 511; *In re Davies's Policy Trusts*, [1892] 1 Ch. 90.

[5] 1887, 14 R. 411.

House Lord President Inglis observed that the expression was ambiguous, and should not be left by itself as a final expression of intention.[1]

676. A more usual provision is to give the wife a liferent of the fund, and the children equal shares in the fee at her death. The provisions in favour of the children may be declared not to vest until majority or marriage. In the event of any of the children dying before their shares became payable, their children would, under the usual condition *si sine liberis decesserit*, be entitled to the parent's share; but grandchildren could not be expressly instituted in the trust. A power of apportionment among the children might also be reserved in favour of the husband or wife, but the policy should declare how the fund is to be distributed failing the exercise of the power. If the purposes of the trust fail, the proceeds of the policy become the property of the assured and his representatives, in virtue of the assured's reversionary right as truster.[2]

Section 9.—Life Policies as Securities for Debt.

677. Instead of taking an assignment of a policy from his debtor, a creditor may secure himself by taking out a policy on his debtor's life in his own name, the debtor being bound to pay the premiums. Where this is the nature of the arrangement, it will be presumed that the policy is held by the creditor in security merely, and he will be bound to assign it to the debtor on payment of the debt, or to account to his representatives for the proceeds beyond the principal, interest, and premiums which may be due to him.[3] On the other hand, a policy effected by a creditor in his own name upon his debtor's life, without any agreement that the debtor should pay the premiums, belongs absolutely to the creditor.[4] There appears to be no reason why the policy itself should not specify the limitation upon the right of the person in whose name the policy is taken, if he holds it merely in security.

678. The disadvantage of a security in the form of a policy upon the debtor's life in the name of the creditor is that, when effected, it has no immediate value, and the creditor has to rely upon the debtor's personal obligation for the premiums. To obviate this it used to be a common practice for the borrower to grant an annuity on his life to the lender sufficient to pay the interest on the loan and the premiums of insurance. The form of deed usually adopted was a bond of redeemable annuity, secured on land, which contained a provision that the annuity might be redeemed, due notice being given, on repayment of a sum equal to the original advance, with a proportion of the annuity up to the date of repayment. In the event of this power not being exercised by the grantor, repayment of the principal was secured by

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[1] 14 R. 416.

[2] *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, 154, followed in *In re Engelbach*; *Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348.

[3] *Lindsay* v. *Barmcotte*, 1851, 13 D. 718.

[4] *Stevenson* v. *Cotton*, 1846, 8 D. 872, 880; *Bruce* v. *Garden*, 1869, L.R. 5 Ch. 33.

the policy of insurance on his life. The bond of annuity, if properly drawn in the grantor's interest, contained a provision that on redemption of the annuity the policy should also be conveyed to him. The deeds contained no obligation upon the grantor of the annuity to repay the advance, and in this respect the transaction differed from a loan. At the same time, the tendency in Scotland was to regard the grant as a pledge of the annuity in security of the interest and premiums of insurance, and of the policy in security of the principal sum, and not as a sale with a power of repurchase. When this is the true effect of the transaction, it is immaterial whether the right of redemption is or is not expressly reserved in the deeds, or whether the policy is assigned to the lender or taken in his name. The law presumes that in a pledge the pledgor has a right to redeem, and will imply such a stipulation if not expressed.[1] On the other hand, the tendency in England has been to regard the transaction as a sale of the annuity with a power of repurchase, and to hold that the grantor has no right or interest, apart from special stipulation, in a policy upon his life obtained by the purchaser of the annuity in his own name. This was held, although by the terms of the deed of sale the grantor agreed to pay the extra premiums required in the event of his residing abroad.[2] There is, however, it is thought, no difference in the principle of these decisions; they depend on the view taken of the effect of the transactions; and in Scotland as well as in England the grantor of the annuity would be held to have no interest in a policy on his life obtained by the grantee, if the circumstances were such as to shew that a sale and not a pledge was contemplated.

679. Although these forms of security are now practically obsolete, the principles they lay down are still applicable, and have been applied in a case where the advance was made upon a post-obit bond. Under this form of security, in which a reversion contingent on survivance is mortgaged to the lender, it is usual for the lender to insure his debtor's survivance, so as to provide an indemnity against the event of his never becoming entitled to the reversion. Such a policy is usually taken in the creditor's name, and the reversion is burdened with payment of a fixed sum or reversionary charge calculated as the equivalent of the capital, interest, and premiums on the insurance. If the policy belongs to the debtor, and is merely pledged in security, he is, on the principle already explained, entitled to a reconveyance if the debt is paid during the currency of the policy, or his representatives at his death are entitled to the surplus of the proceeds, if any, after the creditor's claim is satisfied. But if the creditor takes out the policy without any arrangement with the debtor, paying the premiums himself, he is entitled to the proceeds of the policy whether the debt is paid or not, and on the predecease of the debtor is not bound to account for the proceeds to his representatives.

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[1] *Marquess of Queensberry* v. *Scottish Union Insurance Co.*, 1839, 1 D. 1203; *Shand* v. *Blaikie*, 1859, 21 D. 878.

[2] *Knox* v. *Turner*, 1870, L.R. 5 Ch. 515; *Preston* v. *Neele*, 1879, 12 Ch. D. 760, at p. 769.

680. If the transaction is properly a mortgage, then the right to redeem the subject pledged, on payment of the debt, is, as we have seen, an essential condition of the contract, and will be implied if not expressed. By an extension of the same principle, an express provision in the mortgage deed by which the debtor abandons his right to redeem the security, or by which his right to redeem is limited in point of time, will not be given effect to. In other words, a contract of pledge implies the right to redeem the pledge on payment of the debt and interest, and it is incompetent for parties to agree (except under the Pawnbroking Acts) that the right to redeem shall be forfeited after a given period.[1] The same principle seems to be recognised in Scotland.[2] The judgment against the company in the case of *Salt*[3] went mainly on the ground that the deeds by which the post-obit security was created provided that the debtor should be liable for premiums of insurance and that the debt should be deemed discharged by payment under the policy. These conditions were held, by the majority of the Court, to be incompatible with the theory that the policy was taken out solely for behoof of the creditors, and to point to the conclusion that it was held by them as a pledge and as the property of their debtor. It was pointed out that, if the lenders wished to reserve to themselves the exclusive interest in the policy, they ought to effect it without any arrangement with the debtor, neither taking him bound for the premiums, nor entitled to a release from the debt if the policy becomes payable.

681. If an insurance company advances money to the holder of a policy, it has, apart from any assignment or deposit, a prospective right of retention upon the sum due under the policy, a right which would appear to be available against a claim by an assignee of the policy, acquiring a right subsequently to the advance. If during the currency of the policy the insured becomes bankrupt, the company is entitled to rank on his estate as a secured creditor, in virtue of its prospective right of retention.[4]

Section 10.—Life Assurance Companies.

682. It is not proposed in this article to deal with the formation, general constitution, winding up, or amalgamation of life assurance companies, but to confine the discussion to the relation between assurance companies or societies and their policy-holders. The Consolidating Act dealing with the subjects first mentioned is The Assurance Companies Act, 1909,[5] which repeals The Life Assurance Companies Act, 1870;[6]

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[1] *Marquess of Northampton* v. *Salt*, [1892] A.C. 1.

[2] Morison's Dict., *voce* "Irritancy"; *Thomson* v. *Threshie*, 1844, 6 D. 1106; *Smith* v. *Smith*, 1879, 6 R. 794.

[3] *Marquess of Northampton* v. *Salt*, *supra*.

[4] *Borthwick* v. *Scottish Widows' Fund Society*, 1864, 2 M. 595.

[5] 9 Edw. VII. c. 49.

[6] 33 & 34 Vict. c. 61.

The Life Assurance Companies Act, 1871;[1] and The Life Assurance Companies Act, 1872.[2] For the general statutory enactments in regard to companies see Buckley.[3] In relation to the rights and liabilities of policy-holders, life assurance companies properly fall into three divisions: Proprietary companies, consisting of shareholders only; companies partly mutual, whose members include assurance members as well as shareholders; and lastly, purely mutual societies, consisting solely of assurance members.

Subsection (1).—*Proprietary Companies.*

683. In a proprietary company the policy-holders are simply creditors of the company, but, in general, by the terms of the policy, their claim is limited to the funds of the company. The effect of this provision is to exclude personal liability on the part of the shareholders. The remedy available to the assured is only against the company as a corporate body. He has a right to insist that the company should make its funds available by realising its assets and by calling up any contributions to the funds which the company is entitled by the deed of constitution to require from its members, but he has no direct right to proceed against the members. It is thus immaterial, in a question with the policy-holders who have accepted policies in these terms, whether the company is limited by shares or by guarantee, or whether its constitution depends merely on a deed of settlement and the general liability of the shareholders is unlimited.[4]

684. The position of policy-holders is not affected by their being entitled to participate in profits. Such participation does not imply that they are partners, or incur the responsibility of partners.[5] The true test of partnership lies not in the fact that the alleged partner is entitled to a share of profits, but that he has given a mandate or authority to a particular person or set of persons to carry on a business or trade on his behalf. Such an agency implies a right in the partner to a voice in the management of the business carried on, and a claim to have the profits accounted for to him, and his due share allotted. But a participating policy-holder has, as a rule, no right to any part in the management of the company's affairs, and his right to profits is merely a right to take such profits as the directors may assign to him. They are in no proper sense his agents in carrying on the business of insurance any more than the directors of a bank are agents for the depositors, and he has no right to demand an accounting from the company if dissatisfied with his share of the profits.

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[1] 34 & 35 Vict. c. 58. [2] 35 & 36 Vict. c. 41.

[3] The Companies Consolidation Act, 1924, 10th ed.

[4] *Lethbridge* v. *Adams*, 1872, L.R. 13 Eq. 547; *In re Accidental Death Insurance Co.*, 1878, 7 Ch. D. 568; *In re Great Britain Mutual Life Assurance Society*, 1880, 16 Ch. D. 247; The Companies Consolidation Act, 1908 (8 Edw. VII. c. 69), s. 123.

[5] *In re English and Irish Church and University Society* (No. 2), 1863, 1 H. & M. 85; *Cox* v. *Hickman*, 1860, 8 H.L.C. 268; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2.

SUBSECTION (2).—*Companies Partly Mutual.*

685. When, however, the holders of participating policies agree to become members by the terms of their proposals and policies, and are declared by the constitution of the society to be members, there is no room for any presumption of law. They are undoubtedly partners, and under the terms of s. 24 of the Companies Act of 1908 they are liable to be placed upon the list of contributories.[1] The position of assurance members is, however, in two respects different from that of shareholders. In the first place, an assurance member may at any time terminate his membership by allowing his policy to drop; and, secondly, he undertakes no liability to contribute to the capital or funds of the company, either in the way of calls or of premiums. The holder of a policy does not, in general, enter into any contract to pay premiums. The payment of premiums is merely a condition which must be fulfilled by the assured before he can claim any benefit under the policy; it is not an obligation which the company can enforce. It therefore follows that, as regards policy-holders and annuitants who are not members, and who have contracted with the company on the footing that the funds are alone to be liable, assurance members incur no liability whatever.[2] In the second place, assurance members in a company consisting both of shareholders and assurance members cannot be called on to contribute to the general debts of the company along with the shareholders. The assurance members are, as we have seen, not bound to contribute any of the capital, and it follows that their liability, if any, for the debts of the company is a secondary liability, and can only emerge after the shareholders have paid up the calls for which they are liable.[3] Thus the only liability which can attach to assurance members in a company in which there are also shareholders is that they may be called on as contributors, after the shareholders are exhausted, to make good the claims of outside creditors who have not limited their remedy, by the terms of their contract, to the funds of the society.

SUBSECTION (3).—*Purely Mutual Societies.*

686. A mutual life society is one which confines its transactions within its own body. Such a society could be wound up under the Life Assurance Companies Act, 1870, which contains a definition of the term "company" sufficiently wide to include a mutual company.[4] And by s. 15 of the Assurance Companies Act, 1909,[5] the Court appears

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[1] *Winstone's* case, 1879, 12 Ch. D. 239.

[2] *In re The Kent Mutual Assurance Society*, 1871, Albert Arbitration, 16 Sol. J. 65; *Lethbridge* v. *Adams*, 1872, L.R. 13 Eq. 547.

[3] *Strachan's* case, 1872, Albert Arbitration, 16 Sol. J. 572; *In re Albion Life Assurance Society*, 1880, 16 Ch. D. 83.

[4] *In re Great Britain Mutual Life Assurance Society*, 1880, 16 Ch. D. 247; 1881, 19 Ch. D. 39; 1882, 20 Ch. D. 351.

[5] 9 Edw. VII. c. 49.

to have power to wind up all assurance companies within the meaning of that Act. *The Great Britain Life Assurance Society* consisted of assurance members only, these being defined to be persons who should effect assurances with the society, some of the members holding participating and others non-participating policies. The society was established by deed of settlement in 1844, but it was not registered under the Act of that year or under the Companies Act of 1862. In 1880 the society became insolvent, and applications were in the first instance made for a winding-up order, but afterwards for the approval by the Court of a scheme for the reduction of the amount of the contracts of the society, in terms of s. 22 of the Life Assurance Companies Act, 1870. The latter course was that ultimately adopted, and a scheme was sanctioned under which the different classes of policy-holders and of annuitants were treated on the same footing. The only interests involved in the case were those of members, and had the company been wound up, all that could have been done was to distribute the funds among the members in proportion to the value of their claims.[1]

687. The right of a member in a mutual life society is a right to participate in a fund, and not a right as creditor to have the sum assured to him made good by the other members. A mutual life society thus differs essentially from a mutual marine society, where the members undertake to contribute whatever may be necessary to meet the loss sustained by any one of their number. A mutual life society is not an association for the acquisition of gain, and accordingly it has been held that in such a life society no part of the premiums received from the members is liable to be charged with income tax as profits or gains made by the society. The surplus of the premiums which is returned to the members under the name of profits is not made in carrying on any trade or business with the public, but is simply the excess of the contributions made by the members over what is necessary to secure the benefits payable out of the common fund.[2] On the other hand, it has been held, as regards the obligation to pay income tax, that a mutual society which does business with the outside public by issuing policies or granting annuities to persons who are not members is in the same position as any other company.[3] From the views expressed in the case of *Styles* [4] it seems to follow that the members of a mutual society are liable to policy-holders, and to annuitants who are not members, to the same extent as the shareholders in a proprietary company, with this exception, that they do not undertake to make any contribution in the nature of calls to the funds of the

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[1] Per James L.J., 16 Ch. D. 255 ; see also *Smith* v. *Anderson*, 1880, 15 Ch. D. 247.

[2] *New York Life Insurance Co.* v. *Styles*, 1889, 14 App. Cas. 381. This case was examined and explained by the Court of Appeal (confirmed by the House of Lords) in *Commissioners of Inland Revenue* v. *Cornish Mutual Assurance Co.*, 1924, 132 L.T. 310 ; 94 L.J. K.B. 237 ; (H.L.) [1926] A.C. 281.

[3] *Last* v. *London Assurance Corporation*, 1885, 10 App. Cas. 438 ; *New York Life Assurance Co.* v. *Styles*, *supra*.

[4] Per Lord Watson at p. 393.

society. This means an exclusion of liability as regards the large class of creditors who hold policies giving them no claim except against the funds. Even as regards such creditors, however, it would follow from their position as partners, that the claims of assurance members upon their policies would be postponed, in the distribution of the funds, to the claims of policy-holders and annuitants who were not members.

PART V.—MARINE INSURANCE.

Section 1.—Introductory.

688. The law of marine insurance was codified by the Marine Insurance Act, 1906,[1] which will hereafter be referred to as "the Act," and its words will be used to state the law when applicable. While the Act is in the main declaratory of the law as it was at its date, it introduced some changes, and the statutory provisions, if clear, must be given effect to.[2] The Act is not a complete code, and the rules of the common law, save so far as inconsistent with the express provisions of the Act, continue to apply (s. 91 (2)). The sequence of the Act is followed as far as possible in this article.

Section 2.—The Nature of the Contract.[3]

689. The contract is one of indemnity, whereby the insurer undertakes to indemnify the assured, in manner and to the extent agreed, against losses incident to marine adventure (s. 1). The insurance may be extended to protect the assured against losses on inland waters, or on any land adventure interposed in or subsidiary or incidental to any sea voyage (s. 2 (1)). A policy on goods may cover risks during their carriage by rail preparatory or subsequent to the sea voyage, or while the goods are in warehouses waiting transit or final delivery. The contract is also used to insure a ship undergoing repairs against risk of loss or damage during the operation (s. 2 (2)). A ship is practically always insured during construction, and against the risk of loss and damage when being launched. The insurance of any adventure analogous to a marine adventure by a policy of marine insurance will be subject to the general law of marine insurance and to the provisions of the Act so far as applicable (ss. 2 and 3).

690. Although the fact that the contract is one of indemnity underlies the whole law applicable to it, this does not mean that the assured may not in any case recover more than his actual loss, or that the contract is necessarily one of indemnity only. Of course he may recover less, for he may have only assured part of his risk. But he may also recover more, *e.g.* in the case of a valued policy where the valuation represents more than the true value of the subject insured at the time of loss, or of a total loss of freight where the law does not require a

[1] 6 Edw. VII. c. 41. [2] *Hall* v. *Hayman*, [1912] 2 K.B. 5, at p. 12. [3] Act, ss. 1–3.

deduction to be made in respect of the cost of earning the freight, which the assured has been saved by the loss. In a case under a valued policy, where a ship was insured against loss by fire only, and where thirty-six hours before being burnt she had sustained such severe injuries as to make her a constructive total loss, on her total loss by fire the assured was held entitled to recover the full amount agreed to.[1] Numerous cases of the same kind may happen one way or the other from the application of the settled principles on which adjustment of losses proceeds.

691. Every lawful marine adventure may be the subject of the contract. Ships, goods, or other moveables, or the earning or acquisition of any freight, passage-money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, may be insured against the risk of loss or damage from the perils specified in the policy. So also may any liability which a third party incurs to the owner of, or other person interested in or responsible for, property itself insurable (s. 3). In one well-known case the insurance was of an interest in a company concerned in the laying of the Atlantic Cable;[2] in another case it was the risks attending the transit of certificates of stock.[3] The perils insured against are "maritime perils," which are defined by the Act[4] as the perils consequent on or incidental to the navigation of the sea—that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.

Section 3.—Insurable Interests and Honour Policies.[5]

692. The assured must, in general, have an interest in the subject of insurance before or at the time of loss. When the policy declares that it is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or uses other like terms, it is void under the Act giving effect to older statutes. The assured may, however, lawfully bargain that the insurer is not to have the benefit of salvage where there is no possibility of salvage accruing (s. 4). Where the insurance is of such a kind that there is nothing that can be abandoned in the event of loss to the insurer, a policy can lawfully be effected "without benefit of salvage."[6]

693. Notwithstanding the statutory prohibition, a large business is still done by underwriters under "honour policies"—that is, policies which contain such clauses as those struck at by the Act. As a general rule, underwriters fulfil their obligations under such policies, which

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[1] *Woodside* v. *Globe Insurance Co.*, [1896] 1 Q.B. 105; *cf.* also *Lidgett* v. *Secretan*, 1871, L.R. 6 C.P. 616; *The "Main,"* [1894] P. 320.

[2] *Wilson* v. *Jones*, 1867, L.R. 2 Ex. 139.

[3] *Baring Bros.* v. *Marine Insurance Co.*, [1893] W.N. 164.

[4] Sec. 3.

[5] Act, ss. 4–14.

[6] *Lucena* v. *Craufurd*, 1806, 2 B. & P. (N.R.) 269, at p. 310.

are largely used in transactions where the assured has, or is supposed to have, a substantial interest to insure, but owing to special circumstances there may be room for legal question as to the extent of his insurable interest. It is desired to avoid questions, and the underwriter therefore bargains that he shall not raise them. But the results are frequently anomalous.

694. By the Marine Insurance (Gambling Policies) Act, 1909,[1] if a person effects a marine insurance without any *bona fide* interest, direct or indirect, or a *bona fide* expectation of acquiring such an interest, or if any person in the employment of the owner of a ship not being a part owner effects insurance in relation to the ship, and the contract is made interest or no interest, or without further proof of interest than the policy itself, or without benefit of salvage to the insured, or subject to any other like term, the person effecting the insurance is guilty of a criminal offence. The insurable interest required by law must be something more than a mere possibility of gain, not founded on any right or liability (legal or equitable) in, or in respect of, the subject-matter insured (s. 5 (2)). Insurable interest, in the absence of proof to the contrary, is presumed.[2] The tendency of modern law is to recognise an insurable interest in all cases where there is foundation for doing so.[3] The assured cannot acquire an interest by any act of his after the date of loss (s. 6 (2)). But in the case of a policy which provides that the risk is to attach "ship lost or not lost," or uses similar words, it is immaterial that the subject-matter insured was lost at the date of the insurance unless the assured was aware of the fact, and the insurer was not (s. 6 (1)).

695. The question of insurable interest in goods may, and frequently does, depend on how far under the contract of sale the property has passed before the date of loss.[4] In the case of shipbuilding risks, the builder's insurance generally ends with delivery, and the question then (sometimes nominally tried between builders and purchasers, but really between their respective insurers) is, Has the builder made over by delivery the ship to the purchaser?[5] The insurable interest may be one defeasible, contingent, or inchoate. It may be partial only (ss. 7 and 8).

696. An insurer has an interest to reinsure (s. 9). Even though he becomes insolvent and unable to pay the claim on him, he can recover from the reinsurer the full amount,[6] and the usual clause in the reinsurance policy, "to pay as may be paid," does not affect this matter. This clause is, in any view, of limited application and has been found difficult of interpretation on a number of points.[7] A reinsurance of

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[1] 9 Edw. VII. c. 12.

[2] *Cousins* v. *Nantes*, 1811, 3 Taunton 513.

[3] *Moran, Galloway & Co.* v. *Uzielli*, [1905] 2 K.B. 555.

[4] *Anderson* v. *Morice*, 1876, 1 App. Cas. 713; *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 1886, 12 App. Cas. 128; *Inglis* v. *Stock*, 1885, 10 App. Cas. 263.

[5] E.g. *Brewer & Co.* v. *Duncan & Co.*, 1892, 20 R. 230.

[6] *In re Eddystone Insurance Co.*, [1892] 2 Ch. 423.

[7] *Uzielli* v. *Boston Marine Insurance Co.*, 1884, 15 Q.B.D. 11; *Chippendale* v. *Holt*, 1895, 1 Com. Cas. 197; *Crocker* v. *Sturge*, [1897] 1 Q.B. 330; *China Traders' Association* v. *Royal Exchange*, [1898] 2 Q.B. 187; *Charlesworth* v. *Faber*, 1900, 5 Com. Cas. 408; *Marten* v. *Steamship Underwriting Association*, 1902, 7 Com. Cas. 195.

policies, and subject to the same terms as original policies, has been held not necessarily to imply that the policies on which the reinsurer has to pay are in existence at the date of the reinsurance.[1] A contract of reinsurance is one of indemnity only, and the reinsured is entitled to the benefit of any compromise made by the original insurer.[2] If the reinsurer agrees to be bound by the terms of the original policy without notice, non-disclosure of a material fact does not affect the reinsurers liability.[3] If, however, in the absence of such a provision, the terms of the original policy are altered, where the reinsurance is subject to the same conditions as the original policy, the reinsurer is not liable.[4]

697. A carrier or other custodier has an interest to insure to the extent of his responsibility; as has a lender on bottomry or respondentia (s. 10), or a mortgagee, to the extent of the loan. In the latter case the mortgagor has an insurable interest for the full value of the subject; the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage (s. 14 (1)). A mortgagee, a consignee, or other person having interest may insure for others interested as well as for himself (s. 14 (2)). The master has an insurable interest in his wages as well as his effects. Seamen can now insure their wages (s. 11).

698. Insurances on freight present delicate questions on this branch of the law. In the case of a general ship, the rule was supposed to be that the ship must be ready to load, and the goods at least alongside ready for shipment, before there was interest. But this does not express the limits of insurable interest on freight. If there is an agreement to load on the part of the cargo-owner, and the ship is at the port of loading ready to load, this is sufficient to entitle the freight insurer to recover. If the insurance is on chartered freight, and the ship, having sailed in ballast in terms of the charter for the port of loading, is lost on the way, there is a good insurable interest.[5] So it is thought, even where the ship has sailed with cargo for the loading port in terms of or as contemplated by the charter. Of course much depends on the terms of the agreement as to risk. In a case where a shipowner had a freight engagement from Valparaiso to the United Kingdom, and the ship sailed from London to Valparaiso, Lord Esher, M.R., said that there was no doubt the shipowner had an insurable interest to insure the home freight as at risk on the outward voyage, although in the particular case the insurance being "at or from" the loading port, the risk had not attached.[6] In such a case, however, the terms of the policy should clearly cover the outward risk. A person advancing freight under

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[1] *Lower Rhine and Wurtemburg Association* v. *Sedgwick*, [1899] 1 Q.B. 179.

[2] *British Dominions General Insurance Co.* v. *Dudes*, [1915] 2 K.B. 394.

[3] *Property Insurance Co.* v. *National Protector Insurance Co.*, 1913, 18 Com. Cas. 119.

[4] *Norwich Union Fire Insurance Co.* v. *Colonial Mutual Fire Insurance Co.*, [1922] 2 K.B. 461.

[5] *Barber* v. *Fleming*, 1869, L.R. 5 Q.B. 59; *cf.* also *Foley* v. *United Fire and Marine Insurance Co.*, 1870, L.R. 5 C.P. 155.

[6] *The "Copernicus,"* [1896] P. 237.

circumstances or on conditions which imply that it is not to be recoverable in the event of loss, has an insurable interest in the advance (s. 12).

Section 4.—Insurable Value.

699. Subject to any express provision or valuation in the policy, the insurable value of the subject-matters insured must be ascertained as follows:—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, *plus* the charges of insurance upon the whole.

The insurable value in the case of a steamship includes also the machinery, boilers and coals, and engine stores, if owned by the assured, and in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade.[1]

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, *plus* the charges of insurance.

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, *plus* the expenses of and incidental to shipping and the charges of insurance upon the whole.

(4) In insurance on any other subject-matter or interest, the insurable value is the amount at the risk of the assured when the policy attaches, *plus* the charges of insurance (s. 16).

Reference may be made to a case where the meaning of the words "hull and machinery" as in contrast with the word "ship" was considered.[2] The question of the measure of indemnity is dealt with below.[3]

Section 5.—Disclosure, Concealment, Representation.

700. As the contract of marine insurance is one *uberrimæ fidei*, if either party fail to observe good faith to the other the latter can avoid the policy (s. 17). It will be noticed that the obligation is reciprocal, but in general the question arises at the instance of the underwriter on an allegation that the assured has either failed to disclose, or has misrepresented, some material circumstance bearing on the contract. If proved, either ground will avail. The burden of proof is on the insurer.[4] The circumstance will be material if calculated to influence the judgment of a prudent insurer in fixing the premium, or in determining whether he will take the risk; and in each case it is a question of fact whether or

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[1] *Hogarth* v. *Walker*, [1900] 2 Q.B. 282.
[2] *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, [1895] 2 Q.B. 380.
[3] See para. 714 *et seq.*, *infra*.
[4] *Davies* v. *National Fire and Marine Insurance Co. of New Zealand*, [1891] A.C. 485.

not the concealment or misrepresentation is material (ss. 17, 18). The concealment may be of communications or information received by the assured which he has not verified, but which nevertheless would naturally influence the mind of the insurer. One or two illustrations may be given. The "*State of Florida*" was overdue, and was being further insured. It was held material concealment not to disclose that a ship, which had reached home, thought she had made out the letters "Sta" signalled to her by another ship.[1] A ship was insured at an unduly high valuation through the assured's managing agents, and the managing agents had themselves farther largely insured her for so-called disbursements, etc., by honour policies and otherwise, without disclosing this. It was held by the House of Lords, reversing the Court of Session, that the failure to disclose the additional insurances voided the policies.[2] In another case, where the insurance covered risks when the goods were in lighters, it was held material concealment not to disclose that by the assured's arrangement with the lighterman there was no recourse on him for loss due to his negligence.[3] Where there was a representation, which was untrue, that the vessel was sailing under the British flag, which implied she was entitled to be registered as a British ship, and the interest of a Greek in the vessel was concealed, which was material in view of underwriters' attitude to Greek ships, the contract was held to be void.[4] Each case depends on its own circumstances and the usages of the trade.[5]

701. The assured is not bound to disclose any circumstance which diminishes the risk, or as to which information is waived by the insurer (s. 18 (3)). Where a charterer insured profit on freight, and disclosed the fact that he had a charter, it was held that he was not bound to disclose the material fact that the freight was a lump sum and not a tonnage rate, because it was for the insurer to make further inquiry, since the provision for a lump freight is usual in such charters, as also is provision for a rate freight.[6] The assured must disclose unusual clauses in a charter. If the insurer stipulates for an express warranty on any particular point, the assured need not disclose any circumstance affecting that point, so far as covered by the bargain (s. 18 (3) (*d*)). So with an implied warranty, *e.g.* in an ordinary voyage policy, the assured need make no disclosure with reference to the seaworthiness of the ship, for he warrants her seaworthiness.[7] The rule would be different in a time policy.

702. As the insurer is presumed to know matters of common notoriety or knowledge, and matters which in the ordinary course of his business

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[1] *Blackburn, Low & Co.* v. *Haslam*, 1888, 21 Q.B.D. 144.

[2] *The "Gunford" Ship Co.* v. *Thames and Mersey Marine Insurance Co.*, 1911 S.C. (H.L.) 84; [1911] A.C. 528.

[3] *Tate* v. *Hyslop*, 1885, 15 Q.B.D. 368.

[4] *The "Spathari,"* 1925 S.C. (H.L.) 6.

[5] Cf. *Bates* v. *Hewitt*, 1867, L.R. 2 Q.B. 595; *Gandy* v. *Adelaide Marine Insurance Co.*, 1871, L.R. 6 Q.B. 746; *Hutchinson* v. *Aberdeen Insurance Co.*, 1876, 3 R. 682; *Harvey & Co.* v. *Seligmann*, 1883, 10 R. 680; *Associated Oil Carriers* v. *Union Insurance Society of Canton*, [1917] 2 K.B. 184; *Mann, Macneal & Steeves* v. *Capital and Counties Insurance Co.*, [1921] 2 K.B. 300; *Greenhill* v. *Federal Insurance Co.*, 1925, 31 Com. Cas. 289.

[6] *Asfar* v. *Blundell*, [1896] 1 Q.B. 123.

[7] *Baker and Adams* v. *Scottish Sea Insurance Co.*, 1856, 18 D. 691.

he ought to know, the assured need make no communication regarding these (s. 18 (3) (*b*)). The case of *Asfar*[1] to some extent illustrates the rule; also that of *Gandy*,[2] and indeed many of the cases on the subject of concealment. These exceptions apply in the absence of inquiry. If inquiry is made, the answers, so far as material, must be true and must be frank. It has been held that there is no obligation to give information as to the true person assuring.[3] Where the seaworthiness of a floating dock was admitted by underwriters, it was held they were bound to make inquiry as to the construction, and could not succeed on a plea of concealment.[4]

703. No particular form of words is needed to constitute a representation (s. 20 (4)). Whatever the assured says or does which reasonably leads the insurer to a particular conclusion will amount to a representation. If there be doubt whether or not there was actual misrepresentation, in marine insurance the case will generally be met by holding it to be either a positive misrepresentation or a case of undue concealment. As long as a representation as to a matter of fact is substantially correct, this is enough (s. 20 (4)). A representation may be either as to matter of fact, or as to matter of expectation or belief. In the latter case, if made in good faith, it is not a misrepresentation though inaccurate in fact (s. 20 (5)). Though asked, the assured is not bound to state his personal opinion on matters affecting the risk. Of course, if he does do so, the opinion must be fairly stated. But so long as the assured puts the insurer in possession of all the materials he has on which to form a judgment, he can leave the latter to come to his own conclusion.

704. The rules applicable to the assured also apply to the agents he employs to negotiate the contract (s. 19). But it has been held that when brokers employed to insure were in possession of material information which they did not disclose to the assured, an insurance subsequently effected through other agents was not affected by the concealment of the first agent.[5] On the other hand, where mercantile agents of the insured kept back from him the knowledge of material facts which in ordinary course they should have communicated, to give him time to insure, this was held concealment for which the insured was so far responsible as to entitle the insurers to void the policy.[6] But there must have been time for the knowledge to reach the party dealing with the insurers by the ordinary channels. The telegraph must be used if this is the reasonable way to make the communication. If the assured or his agents keep back, from sub-agents employed to insure, material facts they know, the plea of undue concealment will be sustained.[7]

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[1] *Asfar* v. *Blundell*, [1896] 1 Q.B. 123.
[2] *Gandy* v. *Adelaide Marine Insurance Co.*, 1871, L.R. 6 Q.B. 746.
[3] *Glasgow Assurance Corporation* v. *Symonson*, 1910, 16 Com. Cas. 109.
[4] *Cantiere Meccanico Brindisino* v. *Janson*, [1912] 3 K.B. 452.
[5] *Blackburn* v. *Vigors*, 1887, 12 App. Cas. 531.
[6] *Proudfoot* v. *Montefiore*, 1867, L.R. 2 Q.B. 511.
[7] *Blackburn, Low & Co.* v. *Haslam*, 1888, 21 Q.B.D. 144.

705. The matter of warranties will be referred to later;[1] but meantime it may be noted that while, to void a policy, a misrepresentation must be material, in the case of breach of warranty it is of no moment whether or not the breach is material—if the warranty is broken the insurer may void the policy.

706. In questions arising out of the contract of marine insurance it is not necessary that either the concealment or misrepresentation should be fraudulent, though in general fraud must be proved to ground a claim in respect of concealment or misrepresentation.[2] In all cases of concealment and of misrepresentation the policy is voidable only, and therefore the insurer may waive his right to set it aside.[2] The ordinary rules of law in such cases apply, and therefore are not here further considered. In general, proof of concealment or misrepresentation as to a material fact will end the matter; but if it can be affirmatively shown that the insurer himself was not influenced by the misrepresentation, then he cannot set aside the policy,—if, *e.g.*, the insurer knows and has in view the material fact concealed; but it is not enough that he may have heard it, if in point of fact it is not present to his mind.[3] It is on this principle that a representation, if made on a particular point with regard to which an express warranty is asked, is held superseded. The insurer has not relied on the representation, but has made the point matter of bargain, and must stand or fall by his bargain.

Section 6.—The Slip.

707. Once the proposal of the assured has been accepted by the insurer, the bargain is concluded, to the effect of entitling the assured to conceal facts, however material, which may come to his knowledge between the acceptance and the issue of the policy. For the purpose of showing when the proposal was accepted, it is competent to refer in evidence to the slip or other memorandum, although it be unstamped (ss. 21, 89). The slip is a short memorandum of the terms of the contract, initialed by or on behalf of the insurers. No action will lie on it to compel issue of a policy.[4]

Section 7.—The Policy.

Subsection (1).—*Requisites of Policy.*

708. By statute the contract itself can only be evidenced by a policy.[5] A note signed by an agent is not a policy and is invalid.[4] Policies

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[1] See para. 726 *et seq.*, *infra*.

[2] *Morrison* v. *Universal Marine Insurance Co.*, 1873, L.R. 8 Ex. 197.

[3] *Bates* v. *Hewitt*, 1867, L.R. 2 Q.B. 595.

[4] *Fisher* v. *Liverpool Marine Insurance Co.*, 1874, L.R. 9 Q.B. 418; *Ionides* v. *Pacific Marine Insurance Co.*, 1871, L.R. 6 Q.B. 647, 685; *Gonforsikrings Aktieselskabet (Skandinavia Reinsurance Co.)* v. *Da Costa*, [1911] 1 K.B. 137; *Clyde Marine Insurance Co.* v. *Renwick & Co.*, 1924 S.C. 113; *Mackay* v. *Scottish Boat Insurance Co.*, 1903, 40 S.L.R. 675.

[5] *In re National Benefit Assurance Co.; ex parte English Insurance Co.*, [1928] Ch. 74; affd. (H.L.) 44 T.L.R. 801; Stamp Act, 1891, ss. 91–97.

may be voluntarily issued after loss (s. 22). The policy must specify (s. 23)—

(1) The name of the assured, or of some person who effects the insurance on his behalf.

(2) The undertaking to insure.

(3) The subject-matter insured and the risk insured against.

(4) The voyage, or period of time, covered by the insurance.

(5) The sum or sums insured.

(6) The name or names of the insurers.

But it usually does also set forth various other matters. A form of Lloyd's Policy is annexed to the Act (First Schedule). Policies cannot be materially altered without consent of the insurers; and even with such consent they can only be altered to a limited extent, owing to the provisions of the Stamp Acts.[1]

Subsection (2).—*Name.*

709. The name inserted in the policy is very commonly that of the insurance broker who negotiates the contract, and as the policy indicates, those insured are the persons to whom the assurance pertains at the date of the loss. This does not mean that the policy is transferred simply by sale of the subject insured. On the contrary, if the assured ceases to have interest in the subject before loss, and does not, as part of the bargain of sale, expressly assign his right under the policy, the policy lapses (ss. 15, 51); but he may so assign (s. 50). As has been seen, it is sufficient if the true assured has interest before the time of loss (s. 6). If a policy has been *bona fide* made by or on behalf of the true assured, though without his authority, he may ratify the assurance even after loss (s. 86). But to entitle a person to claim, there must be evidence of intention by the persons insuring to insure on his behalf.[2] Policies can be assigned by indorsement or in any other customary manner (s. 50).

Subsection (3).—*Subject-matter Insured.*

710. The subject-matter insured must be designated with reasonable certainty, a rule in substance common to all contracts. The nature and extent of the assured's interest need not be specified. When a lender on bottomry or respondentia insures, or an insurer reinsures, the nature of the interest should be specified. It has, however, been held not essential to specify that an insurance is a reinsurance.[3] Bills of exchange are not covered by the general term "goods." Commissions and profits should be specified. An insurance on profits at least *prima facie* means profits on goods.[4] An insurance on freight includes the profit made by

[1] Stamp Act, 1891, s. 96.

[2] *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1906] A.C. 336.

[3] *Mackenzie* v. *Whitworth*, 1875, L.R. 1 Ex. D. 36.

[4] *Hodgson* v. *Glover*, 1805, 6 East 316.

a shipowner by carrying his own goods,[1] but not passage-money, unless the policy so indicates. If there is a usage with regard to the designation of the risk, this should be followed. If the subject-matter insured is sufficiently designated in general terms, and a question is raised what interest is covered, in the absence of other indication the interest intended by the assured will be that held insured (s. 26 (3)).

Subsection (4).—*Period Covered by Insurance.*

711. There are, as we shall see, different incidents to the contract, according as it is a contract to insure the subject-matter from one place to another, in which case the policy is called a voyage policy, or to insure the subject-matter for a definite period of time, under what is called a time policy (s. 25). A contract for both voyage and time is frequently included in the same policy. A ship is insured, say, for a voyage and thirty days after arrival. Insurances on steamships are generally now on time policies. Goods are generally insured by voyage policies. In the ordinary case a time policy for a period exceeding twelve months is invalid,[2] but provision has been made whereby such a policy may have a continuation clause—that is, an agreement that, in the event of the ship being at sea or on a voyage when the policy expires, it is to remain in force until the arrival of the ship and not more than thirty days thereafter.[3] A sixpenny additional stamp is charged. In this connection it may be noted that a policy to cover a ship during construction or under repair is sufficiently stamped if stamped as a policy of insurance for a voyage.[4]

Subsection (5).—*Execution and Stamp.*

712. The policy must be signed by or on behalf of the insurer, or, in the case of a corporation, it may be sealed. Where there are two or more insurances, each subscription, unless the contrary be expressed, constitutes a distinct or separate contract with each insurer, and not a joint-contract (s. 24). If the policy is not duly stamped, it can only be after-stamped on payment of a penalty of £100.[5] A policy on several ships for different sums on each ship, but with one set of underwriters, falls only to be stamped for the gross sum insured.[6]

Subsection (6).—*Premium.*

713. The policy usually sets forth the premium or consideration given by the assured to the insurer in respect of the risks undertaken by the latter. When the premium is to be arranged, and no arrangement is come to, or when the insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event

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[1] *Flint* v. *Flemyng*, 1830, 1 B. & Ad. 45.
[2] Stamp Act, 1891, s. 93.
[3] Finance Act, 1901 (1 Edw. VII. c. 7), s. 11; Act, s. 25 (2).
[4] Revenue Act, 1903 (3 Edw. VII. c. 46), s. 8.
[5] Stamp Act, 1891, s. 95.
[6] *Great Britain Premium S.S. Association* v. *Whyte*, 1891, 19 R. 109.

happens, but no arrangement is made, the premium to be paid is a premium which is reasonable (s. 31). In the ordinary case payment of the premium by the assured or his agent and the duty of the insurer to issue the policy are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium. When a policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the assured is responsible to the broker.[1] The usual acknowledgment in the policy of receipt of the premium is, in the absence of fraud, conclusive as between the insurer and assured, but not as between the insurer and the broker (s. 54). The broker has, as against the assured, a lien on the policy for the premiums and charges (s. 53). Reference may be made to the same section as to the broker's right of general lien.

SUBSECTION (7).—*Extent of Risk.*

(i) *Valued Policy.*

714. A valued policy is a policy which specifies the agreed value of the subject-matter insured. In the absence of fraud the value agreed on is conclusive for the purposes of the policy as between the insurer and assured whether the loss be total or partial (s. 27). Unless otherwise agreed, the valuation does not affect the question whether or not there has been a constructive total loss (s. 27 (4)); but usually a clause is now inserted in policies by which the value in the policy is deemed to be the value of the ship insured. If the valuation is of a whole cargo, or of the freight on a whole cargo, and only part of the cargo is carried, or, after the freight insurance is effected, part of the freight is paid or prepaid, then the valuation is so far opened, as it is called, that the insurer has only to pay a fair proportion of the valuation, corresponding to the quantity of goods or freight lost.[2] If in a special case it is impossible to calculate the proportion, the policy will be treated as an open policy up to the sum the insurers have agreed to pay.[3] A valued policy does not dispense with the necessity of the insured shewing he has insurable interest in the subject-matter insured, and insurable interest may be disproved in whole or in part.

(ii) *Open Policy.*

715. An unvalued or open policy leaves the insurable value of the subject-matter insured to be ascertained according to law (s. 28). The rules for ascertainment have already been referred to.[4]

(iii) *Floating Policy.*

716. A floating policy is one which describes the insurance in general terms, and leaves the name of the ship and other particulars to be

[1] Act, s. 53; *Universal Insurance Co.* v. *Merchants' Marine Insurance Co.*, [1897] 2 Q.B. 93.

[2] *The "Main,"* [1894] P. 320.

[3] *Denoon* v. *Home and Colonial Assurance Co.*, 1872, L.R. 7 C.P. 341, per Willes J. at p. 351.

[4] See para. 699, *supra.*

defined by subsequent declaration, which is made by indorsement on the policy, or in other customary manner. Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must comprise all consignments within the terms of the policy, and the value of the goods or other subjects assured must be honestly stated; but an omission or erroneous declaration may be rectified, even after loss or arrival, provided the omission or declaration was made in good faith. Where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of the declaration (s. 29). A floating policy is usually on goods.

(iv) *Double Insurance.*

717. When two or more policies are effected by or on behalf of the assured on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed by law, the assured is over-insured by double insurance. In such a case the assured may claim payment from the insurers in such order as he may think fit (s. 32). This rule may be of practical importance to the assured when he has taken out valued policies, and has valued the subject insured at different figures in the different policies. The assured must credit the insurer he claims from with all sums already received by him from other insurers (s. 31 (2) (*d*)); and therefore if he recover from the insurer on the larger valuation first, he may, when he claims on the lower valuation policy, be met by a plea that he has recovered full payment. If, however, he reverses the process, it is said he is not held to be double insured in a question with the insurers, so long as he does not recover more than the full valuation. When the assured recovers any sum in excess of his legal right to indemnity, he is deemed to hold such sum in trust for the insurers, according to their right of contribution *inter se.* In case of over insurance each insurer contributes rateably to the loss in proportion to the amount for which he is liable. If any insurer pays more than his proportion he can claim contribution from the other insurers (s. 80).

(v) *Under Insurance.*

718. In the case of under insurance the assured is deemed his own insurer for the uninsured balance (s. 81).

Section 8.—Interpretation of the Contract.

Subsection (1).—*General.*

719. The policy in its simple form is a venerable document which generally remains unaltered in itself, but is added to, contradicted, and modified by other written or printed clauses. Accordingly, when there is a conflict between the original policy and the added clauses, the latter

prevail.[1] In questions of a variation between the terms of the slip and the policy it has been held that the slip is the basis of the contract and cannot be modified by the terms of the policy.[2] The general rules applicable to the construction of written contracts affect this contract also. The rule, *e.g.*, that in case of ambiguity the contract is to be read *contra proferentem*, has more than once been applied against the insurers.[3] The various terms in the policy have either the meaning which in popular language they bear or the same legal meaning as in any other legal connection.[4] It of course does not follow that the same result will follow in one contract as in another. That depends on the conditions and scope of each particular contract. Perils of the sea mean the same thing whether used in a contract of affreightment or in a policy. But if a ship goes on a rock through the negligent navigation of the master, in the one case, unless he has bargained to the contrary, the shipowner will be liable to the merchant; in the other he will have a good claim on the insurers.

Subsection (2).—*Proximate Cause.*

720. This leads directly to one of the most important principles which affect the rights and obligations of insurers and assured, viz. that, so far as not otherwise agreed, the insurer is liable for any loss proximately caused by a peril insured against, but he is not liable for any loss which is not so proximately caused (s. 55). It was said by Lord Colonsay, and the remark was approved by Lord Blackburn, that consideration of this rule tends to lead to "philosophical mazes," but the latter judge applied the necessary corrective when he laid down that the facts of each case should be considered on their merits, without shewing too much refinement or subtlety in the application of the rule. That rule may be stated, in other words, as providing that the assured shall have full benefit of the contract of indemnity undertaken by the insurers, while at the same time the latter shall not be made liable for losses which they have not agreed to bear on a reasonable construction of the contract. So interpreted the rule is one common to all mercantile contracts. It follows that each new case has to be considered on its own facts, and treated as within or without the insurer's obligations. Necessarily sometimes the line is a fine one.

721. Anticipating the consideration of the precise risks the insurers agree to bear, the rule may be illustrated by some cases of its application. The insurers are liable for losses due proximately to perils of the sea, though they would not have happened save for the negligence of the assured's agents, *e.g.* in cases of injury to a ship by collision due to

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[1] See on the construction of varying clauses *Hydarnes S.S. Co.* v. *Indemnity Mutual Marine Insurance*, [1895] 1 Q.B. 500.

[2] *Symington & Co.* v. *Union Insurance Society of Canton, No. 2*, 1929, 34 Com. Cas. 233.

[3] *Birrell* v. *Dryer*, 1884, 11 R. (H.L.) 41, 9 App. Cas. 345; *M'Cowan* v. *Baine* (*The "Niobe"*) 18 R. (H.L.) 57 [1891] A.C. 401.

[4] *Wilson, Sons & Co.* v. *Owners of Cargo per The "Xantho,"* 1887, 12 App. Cas. 503.

negligence of the crew navigating her, or by stranding or other casualty in navigation due to like negligence.[1] In time policies, where no warranty of seaworthiness is implied, the insurers are liable for losses which are due proximately to perils insured against, though remotely and substantially to the ship not being in a fit state.[2] If, however, there is no real intervention of the perils of the seas at all, but the ship simply lets in water, *e.g.* because she is not in a state to keep it out, the insurer will not be liable.[3] The insurers are not liable under the ordinary policy for any loss caused by ordinary wear and tear, ordinary leakage and breakage, inherent vice, or nature of the subject insured, or any other ordinary and normal operation of natural causes (s. 55). The distinction in practice between perils of the sea and wear and tear or inherent vice is one sometimes difficult to draw. Spontaneous combustion of coal is not covered, but as regards goods, if the combustion is caused by inherent vice, there is a loss of freight on coals by perils insured where the freight is lost by reason of fire of the coals due to spontaneous combustion.[4]

722. The insurers are not liable for losses proximately caused by delay, though the delay is due to perils insured against (s. 55 (3)). If perishable goods decay because the voyage has been unduly protracted by adverse winds, there is no recovery unless the policy contains, as it sometimes does, special clauses. Where a charter contained a cancelling clause and, the ship having arrived after the cancelling date owing to perils insured against, the charterer exercised his option and cancelled, there was held to be no claim on the insurer.[5] In a time charter provision was made for the charterers giving to themselves an abatement to such extent as they saw fit in the event of the ship becoming inefficient; the ship having become inefficient by perils insured against, the charterers made a deduction from the hire, but this loss was held not to fall on the insurers.[6] On the other hand, where a charter contained the usual clause, that if the ship became inefficient for a certain time the hire should cease, it was held that the insurers were liable for loss of hire due to the ship being damaged by perils insured against.[7] The line seems fine; but the distinction drawn is that in the former class of case there is no loss unless the charterers so resolve, and the loss is therefore proximately due to their action; in the latter, once the perils have made the ship inefficient, the loss necessarily follows, and is therefore proximately due to perils insured against.[8]

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[1] Act, s. 55; *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q.B. 124. [2] *Dudgeon* v. *Pembroke*, 1877, 2 App. Cas. 284.

[3] *Fawcus* v. *Sarsfield*, 1856, 6 El. & Bl. 192; *Ballantyne & Co.* v. *Mackinnon*, [1896] 2 Q.B. 455; *E. D. Sassoon & Co.* v. *Western Assurance Co.*, [1912] A.C. 561.

[4] *The "Knight of St. Michael,"* [1898] P. 30; *Iredale* v. *China Traders' Insurance Co.*, [1900] 2 Q.B. 515. [5] *Mercantile S.S. Co.* v. *Tyser*, 1881, 7 Q.B.D. 73.

[6] *Inman S.S. Co.* v. *Bischoff*, 1882, 7 App. Cas. 670.

[7] *The "Alps,"* [1893] P. 109; *The "Bedouin,"* [1894] P. 1.

[8] Cf. *In re Jamieson*, [1895] 2 Q.B. 90; *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609.

The assured do not recover for extra expense or loss due to detention because of perils insured, *e.g.* detention of ship during repairs. Nor under an ordinary policy on ship can they recover the expense of clearing the ship of cargo so damaged through a collision as to have lost its identity.[1]

723. Insurers are not liable on an ordinary policy on goods for damage done to the reputation of a cargo as a whole, because of actual damage done to part by perils insured against,[2] nor for damage done by the handling of goods which had to be dealt with in consequence of damage to the ship,[3] nor for the cost of examining goods, which turned out not to be damaged, on the reasonable suspicion that they were or might be damaged.[4]

724. The question of "proximate cause" arose acutely during the Great War of 1914–1918. Over that period the Government requisitioned merchant ships on a form of charter known as T99. Under that charter the Admiralty were not to be liable if the ship was lost by or in consequence of dangers of the sea, collision, or any other cause arising as a sea risk. The risks which the Government took under the charter were the risks excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: "Warranted free of capture, seizure, and detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." There were frequent collisions between merchant ships and ships of war sailing under Admiralty directions at night without navigation lights. Ships sailing in convoy were in similar difficulty from time to time and some also grounded. The question which always arose as a result of the damage to or loss of the ship was whether it occurred by a cause "arising as a sea risk," in which case the marine underwriters were liable to the owners, or whether it arose from "the consequences of hostilities or warlike operations," in which case the Government was liable. The initial point always was what was the "proximate cause" of the damage, and the second into which category did it fall. Thus, where a vessel sailing in convoy at night without lights and carrying in weight 16 per cent. cargo for war purposes sheered and sank another vessel in the convoy through a breakdown in her steering-gear and without any negligence on her part, it was held that the proximate cause of the accident was the breakdown of the steering gear and was not the consequence of a warlike operation.[5] Similarly, the marine underwriters had to bear the loss where a ship ran on a reef,[6] and also where a vessel struck a sub-

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[1] *Field S.S. Co.* v. *Burr*, [1899] 1 Q.B. 579.
[2] *Cator* v. *Great Western Insurance Co. of New York*, 1873, L.R. 8 C.P. 552.
[3] *Pink* v. *Fleming*, 1890, 25 Q.B.D. 396.
[4] *Lysaght, Ltd.* v. *Coleman*, [1895] 1 Q.B. 49.
[5] *The "Clan Matheson,"* [1928] 2 K.B. 557, the last case of the series, and where practically all are referred to.
[6] *The "Matiana,"* [1919] 2 K.B. 670.

merged wreck of another vessel sunk by a submarine.[1] On the other hand, where an hospital ship carrying wounded and sailing without lights collided with a merchant ship, the cause of the collision being due to the fault of the hospital ship, the liability was held to attach to the war risk underwriters, notwithstanding that there was negligence, the dominant and effective cause of the collision being the operation in which the ship was engaged and being warlike.[2] Similarly, where a steamer sailing without lights collided with a destroyer on patrol, and where a merchant ship sailing in convoy collided with a warship sailing to a port to pick up a convoy, the war risks' underwriters were held liable.[3] In another case a vessel torpedoed forward was able to reach port with the assistance of tugs though settling by the head. She was berthed in an exposed berth, where she grounded at each tide, and ultimately her bulkheads gave way and she became a total loss. It was held that the grounding was not a *novus actus interveniens* and that the torpedoing was the proximate cause of the loss.[4] In another case the master of a German ship put into a neutral port to avoid capture, though the ship had not been chased, the master's intention being to wait there till the termination of the war. An owner of the goods, which were insured against the usual perils, including enemies and men-of-war, sued the underwriters. It was held that the frustration of the adventure was caused not by a peril insured against but by the voluntary act of the captain in putting into port to avoid the risk of capture.[5] It is difficult to derive any general principle on the question of proximate cause from these cases, each turning on its own facts and the distinctions being somewhat fine.

725. If the loss is due to the misconduct of the assured, he can, of course, make no claim (s. 55). If, *e.g.*, on a time policy the assured is privy to the ship insured being sent to sea in an unseaworthy state, he cannot recover for a loss truly, though it may be remotely, brought about by unseaworthiness.[6] The contract is not intended to allow the assured to make insurers liable for his own wrong. This principle was forcibly brought out in a number of scuttling cases. Where it was proved that the ship was scuttled with the connivance of the owner, he could not recover. Where he alleges and gives evidence that the loss is by a peril of the sea and the underwriters offer reasonable explanation that it was not so caused, but was caused by a peril not insured against, *e.g.* scuttling with the connivance of the owner, then if the Court is left in doubt the owner will fail, the *onus* being on him

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[1] *The "Sherwood,"* [1917] 2 K.B. 522. *Cf.* also *The "Petersham"* and *The "Matiana,"* [1919] 2 K.B. 670.

[2] *Attorney-General* v. *Adelaide Steamship Co.*, [1923] A.C. 292.

[3] *Attorney-General* v. *Ard Coasters; Liverpool and London War Risks' Insurance Association* v. *Marine Underwriters of S.S. Richard de Larrinaga*, [1921] 2 A.C. 141.

[4] *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 351.

[5] *Becker, Gray & Co.* v. *London Assurance Corporation*, [1918] A.C. 101.

[6] *Ballantyne & Co.* v. *Mackinnon*, [1896] 2 Q.B. 455.

to prove a loss within the policy.[1] The position of a mortgagee was also considered. The question turned on the mortgagee's title.[2] In a leading case [2] the Court held on the evidence that the insurance was effected on behalf of the owner of the ship; that the title of the mortgagee rested on an equitable assignment from him; and that as the mortgagees were not independently insured they were affected by the fraud of the owner and could not recover on the policy. On the other hand, in another case [3] the Court held on the evidence that the interest of the mortgagee in the policy was not by way of assignment but was original, and that the mortgagee was not affected by the fraud of the owner. It was, however, also held that the loss was not a loss by a peril of the sea and that for this reason the mortgagee could not recover. The decisions would appear to lay down that if it can be said on the evidence as to the effecting of the insurance that the mortgagee derives his title from the owner he becomes affected by the owner's fraud, whereas if it can be said that his title is independent of that of the owner he is unaffected.

Section 9.—Warranties.

Subsection (1).—*General.*

726. The insurance is effected and the policy issued on certain conditions which are implied by law; and frequently on others which the insurers bargain for. In the former case there is an implied, in the latter an express warranty. In either, the insurer's liability is conditional on an exact compliance with the warranty whether it be material to the risk or not (s. 33). If it be not so complied with, the policy may be voided by the insurers, as from the date of the breach of the warranty, but without prejudice to any liability incurred by them before such date. It is no defence to a claim to void a policy on the ground of breach of warranty that the breach has been remedied and the warranty complied with before loss has resulted from the breach (s. 34). But the insurers may agree to continue the risk notwithstanding breach of the warranty, or they may waive the breach, *e.g.* by accepting abandonment in full knowledge, in which case they will be liable for a total loss.[4] In a case of over insurance of freight against war risks only in a sum exceeding the amount allowed by the warranty it was held that the defender, by being a party to the policy, and other underwriters, were precluded by waiver from treating the marine policy as void for breach of the warranty.[5] Non-compliance with a warranty is excused when by reason of unforeseen events the warranty ceases to be applicable to the circumstances of the contract, or when compliance

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[1] *La Campania Martiartu* v. *The Corporation of the Royal Exchange Assurance*, [1923] 1 K.B. 650.

[2] *Graham Joint Stock Shipping Co.* v. *Merchants' Marine Insurance Co.*, [1924] A.C. 294.

[3] *P. Samuel & Son* v. *Dumas*, [1924] A.C. 431.

[4] *Provincial Insurance Co.* v. *Leduc*, 1874, L.R. 6 P.C. 224.

[5] *P. Samuel & Co.* v. *Dumas*, [1924] A.C. 431.

with the warranty is rendered unlawful by subsequent legislation (s. 34). Sometimes the word "warranted" is used with reference to clauses which do not truly infer a proper warranty by the assured, but only a limitation of the liability of the insurers, *e.g.* warranted free from average does not mean that there shall be no average loss, but only that none shall be claimed from the insurers.[1]

Subsection (2).—*Seaworthiness.*

727. The most important implied warranty in a voyage policy is that, at the commencement of the voyage, the ship shall be seaworthy for the purpose of the particular adventure insured (s. 39). To be seaworthy a ship must be reasonably fit in all respects to encounter the ordinary perils of the adventure. She must be so fit as regards her hull, machinery, and equipment, having proper stores, and in the case of a steamer, a reasonable supply of bunker coal.[2] She must have a sufficient number of officers and a competent crew, and the master must be properly instructed.[3] Not only must she be fit in herself, but she must be suitable to carry the contemplated cargo without undue risks, and the cargo must be properly stowed and trimmed.[4] In certain cases the state of the ship and her equipment may satisfy the warranty in a policy on ship, but not do so in a policy on goods, for the latter, though not the former, may be affected by some want of precaution or defect. Where specie was carried as part of the cargo of a ship it was held, in a question under a bill of lading, that it was a breach of the implied contract not to have proper precautions against theft.[5] It may be noted that insurers of goods do not generally take advantage of a breach of the warranty when the assured are innocent and free from all blame.

728. One or two extreme examples of unseaworthiness may be given. A porthole left unclosed when the ship started on a voyage at a place where it could not be reached without disturbing cargo,[6] an uncased pipe exposed from the want of casing to the risk of damage by contact with cargo, and which, once damaged, could let in sea water,[7] were each held to make the ship unseaworthy. It is no answer that the shipowner had used all reasonable diligence to make her seaworthy. However latent the defect, if in point of fact there is one which makes the ship unseaworthy, there is a breach of the warranty. This was so held as regards a latent defect in a steamship's machinery.[8] These

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[1] Cf. *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1904] A.C. 359.

[2] *Ballantyne & Co.* v. *Mackinnon*, [1896] 2 Q.B. 455; *Greenock S.S. Co.* v. *Maritime Insurance Co.*, [1903] 2 K.B. 657.

[3] *The "Gunford" S.S. Co.* v. *Thames and Mersey Marine Insurance Co.*, 1911 S.C. (H.L.) 84; [1911] A.C. 528; *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.*, 1924 S.C. (H.L.) 1.

[4] *Tattersall* v. *National Steamship Co.*, 1884, 12 Q.B.D. 297.

[5] *Queensland National Bank* v. *P. & O. Steam Navigation Co.*, [1898] 1 Q.B. 567.

[6] *Steel & Craig* v. *The State Line S.S. Co.*, 1877, 3 App. Cas. 72.

[7] *Gilroy* v. *Price*, [1893] A.C. 56.

[8] *The "Glenfruin,"* 1885, 10 P.D. 103.

examples, as it happens, are taken from cases on contracts of affreightment, but they serve to illustrate the scope of the warranty.[1] The standard is that current in the country to which the ship belongs at the date of the adventure. It follows that the standard may vary from time to time according to the state of knowledge and practice of the day. This is well illustrated by the fact that in a case tried both in England and Scotland, with different results in the two countries, it was held in both that it was now a requisite to seaworthiness in a modern type of sailing ship with flat bottom, sailing from Hamburg to Barry in November with sand ballast, to have shifting boards fitted, to prevent the ballast shifting.[2] The same decision would certainly not have been given at a much earlier date.

729. The ordinary rule of law is that the warranty applies only, and must be complied with, at the commencement of the risk when the ship starts on her voyage. It is not unseaworthiness for a ship to start with hatches not yet battened down, with accessible portholes open, or with some work still to do in trimming ballast or cargo, or other work of a like kind, provided there is time to do the work as the ship goes down a river, or before the occasion arises when for the safety of the ship it should be attended to, and putting it off causes no real extra trouble, and is reasonable. But wherever the operation is one which it is usual to do before the ship starts, and which can only be done later with practical inconvenience, the neglect to do it, it is thought, infers a breach of the warranty.[3] A ship started on her voyage with muddy water in her boilers, so as to be a source of danger if left there, but as by a common and simple operation the engineer without difficulty could have got rid of the water on the voyage, the fault was held to be negligence during the voyage, not unseaworthiness at the start.[4] Where a ship was in fact seaworthy, but some goods had been carried on deck from a foreign port in breach of a foreign statutory regulation, this also was held not unseaworthiness.[5] Where the policy contemplates a voyage in different stages, during which the subject-matter insured will be exposed to different degrees or kinds of peril, or the ship will require different kinds of equipment, the ship must be seaworthy at the commencement of each stage, and it is sufficient if she is seaworthy for the purpose of that stage (s. 38). Thus, where a policy insures a ship at and from a port, it is sufficient if she is, when in port, seaworthy for lying in port, and is made seaworthy for the voyage prior to starting on it.[6] If, however, the voyage is truly one voyage, where it is usual and reasonable to fit the ship once for all before she starts, and the ship has started without having made reasonable preparations for resisting

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[1] Cf. *Lindsay* v. *Klein* (*The* "*Tatjana*"), [1911] A.C. 194.

[2] *The* "*Culmore*," 1897, 5 S.L.T. 113.

[3] *Gilroy* v. *Price*, [1893] A.C. 56.

[4] *Cunningham* v. *Colvils, Lowden & Co.*, 1888, 16 R. 295; *Seville Sulphur and Copper Co.* v. *Colvils, Lowden & Co.*, 1888, 15 R. 616.

[5] *Wilson* v. *Rankin*, 1865, L.R. 1 Q.B. 162.

[6] *Haughton* v. *Empire Insurance Co.*, 1866, L.R. 1 Ex. 206.

the perils of the whole voyage, this, as already indicated, is a breach of the warranty.

730. The question has been raised in this connection how far failure to take a pilot in the course of a voyage at points where there is a statutory obligation to take such pilot, or it is usual to do so, is unseaworthiness. It is one which has not been clearly settled. It is probably unseaworthiness not to have a pilot where one is required at the commencement of the risk. Except perhaps in the case where by statute a pilot must be taken, it is thought that the failure to take a pilot during the risk is not unseaworthiness but negligence.[1]

731. Implied warranties may in general be modified or waived by bargain. In particular the warranty of seaworthiness may be dispensed with or modified. It is not uncommon to limit the warranty so as not to free the insurer if there are latent defects in the ship. If the policy clearly contemplates an adventure which implies that the ship cannot be in all respects fit to encounter the perils insured, the warranty will be held modified accordingly.[2] The right to waive or modify the warranty is illustrated by the fact that in a time policy, as has already been stated, there is no implied warranty of seaworthiness (s. 39 (5)). In a policy on goods or other moveables there is no implied warranty that they are seaworthy (s. 40), nor does the warranty extend to craft in which the goods may happen to be, although the insurers cover the goods when in such craft.[3] The burden of proving unseaworthiness is on the insurer,[4] though, as in other cases, the burden may be shifted by the real evidence of the case.

Subsection (3).—*Lawfulness of Voyage, Etc.*

732. There is an implied warranty that the adventure insured is a lawful one, and that so far as the assured can control the matter the adventure shall be carried out in a lawful manner (s. 41). It is a principle applicable to all contracts that they must not be in breach of the law. In marine insurance contracts interesting questions arise as to legality in connection with private international law relating to war, neutrality, and aliens, but reference must be made to text-writers so far as these matters are not dealt with under separate articles.[5] There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk (s. 37). But in a Scottish case it was held undue concealment not to disclose that a British ship was having her flag changed in order to avoid the requirements of the Merchant Shipping Acts.[6]

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[1] *Thomson* v. *Bisset*, 1823, 3 Mur. 294; 1826, 4 S. 670. See Arnould, 11th ed., p. 724.
[2] *Burges* v. *Wickham*, 1863, 33 L.J. Q.B. 17.
[3] *Lane* v. *Nixon*, 1866, L.R. 1 C.P. 412.
[4] *Pickup* v. *Thames and Mersey Marine Insurance Co.*, 1878, 3 Q.B.D. 594.
[5] Cf. *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 404.
[6] *Hutchinson* v. *Aberdeen Insurance Co.*, 1876, 3 R. 682.

Subsection (4).—*Express Warranties.*

733. Express warranties may be in any form of words from which the intention to warrant can be inferred, but must be part of the bargain contained in, or incorporated by reference into, the policy (s. 33). An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.[1] As these warranties depend on bargain, they are of the most varied kind. The assured may warrant that he will take a certain portion of the risk by to that extent remaining uninsured;[2] that the ship shall sail by a named date;[3] or was "well" or "in good safety" on a particular day, in which latter case it is sufficient if she be safe at any time during the day (s. 38); or that the ship shall not be in particular waters either between given dates, or, it may be, at all.[4] Then there are conditions which, as already explained, are not warranties proper, but conditions limiting the insurer's liability, *e.g.* the assured warrants that the ship shall be free from capture. The words will in all cases be construed to give fair effect to the bargain, and where necessary the express warranty will carry with it implied conditions to give reasonable effect to it, but such implications will not be easily inferred.

734. Where a ship is expressly warranted "neutral," she must be neutral at the commencement of the risk, and so far as the assured can control the matter, must continue neutral during the risk. She must also, so far as the assured can control the matter, be properly documented, that is, must carry the necessary papers to establish her neutrality, and the assured must not falsify or suppress his papers, or use simulated papers. When goods or other moveables are warranted neutral, there is an implied condition that they shall be neutral owned throughout the risk and properly documented, and that so far as the assured can control the matter the ship shall continue neutral throughout the risk (s. 36). As regards documents, it is thought that it is part of the implied warranty of seaworthiness that a ship shall carry all usual documents reasonably necessary to her safety.[5]

Section 10.—Deviation.

735. When the assured abandons the adventure insured, the contract is put an end to, as, *e.g.* if before the commencement of the risk the destination of the ship is changed from that contemplated in a voyage policy, or the ship does not sail from the port of departure so contem-

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[1] *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, 1868, L.R. 3 C.P. 234; *Sleigh* v. *Tyser*, 1900, 5 Com. Cas. 271.

[2] *General Insurance Co. of Trieste* v. *Cory*, [1897] 1 Q.B. 335; *Muirhead* v. *Forth and North Sea Mutual Insurance Association*, [1894] A.C. 72.

[3] *Bond* v. *Nutt*, 1777, 2 Cowp. 601; *Bouillon* v. *Lupton*, 1863, 33 L.J. C.P. 37; *Sea Insurance Co.* v. *Blogg*, 1897, 3 Com. Cas. 1.

[4] *Birrell* v. *Dryer*, 1884, 11 R. (H.L.) 41, 9 App. Cas. 345.

[5] *Trinder, Anderson & Co.* v. *Thames and Mersey Insurance Co.*, [1898] 2 Q.B. 127.

plated (ss. 43, 44). The same result follows after the commencement of the risk.[1] The voyage is deemed to be changed as soon as the election to change is made, and the insurer may avoid the contract as from the date of election. It is therefore immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs (s. 45 (2)). In the case of a voyage policy the adventure must be prosecuted throughout its course with reasonable despatch; and if without lawful cause it is not so prosecuted, the insurer may avoid the policy as from the time when the delay became unreasonable.[2] A ship must not deviate from the voyage contemplated, or else the insurer may avoid the policy as from the time of deviation, and it is immaterial that the ship may have regained her route before a loss occurs (s. 46). In the case of deviation it is now very common to provide that notwithstanding deviation the ship is to be held covered at a premium to be arranged. Sometimes the assured are taken bound to give prompt notice.[3] There is a deviation when the ship does not proceed on the course of the voyage specifically designated in the policy (s. 46 (2) (*a*)), or, where there is no specification, on the usual course (s. 46 (2) (*b*)), or, in the absence of usage, when with the privity of the assured the ship departs from the course which a prudent master navigating the ship in a seamanlike manner would take (s. 46 (2) (*c*)). When several ports of discharge are specified, the ship may proceed to all or any of them, and the omission to proceed to one or more is not a deviation, but in the absence of usage or sufficient cause to the contrary she must proceed to such of the ports as she elects to go to in their specified, and failing specification their geographical, order (s. 47).

736. Deviation or delay in prosecuting the voyage is excused when caused by circumstances beyond the control of the master and his employer (s. 49 (1) (*b*)); when reasonably necessary to comply with any warranty or for the safety of the adventure, whether the danger apprehended be a peril insured against or not (s. 49 (1) (*c*), (*d*)); for the purpose of saving human life or aiding a ship in distress when human life may be in danger (s. 49 (1) (*e*); but not for the purpose of saving property. It is also excused if due to the wrongous and barratrous conduct of the master or crew, if barratry be one of the perils insured against (s. 49 (1) (*f*)). A deviation or delay is justified where authorised expressly or in general terms by the policy (s. 49 (1) (*a*)). But the licence in the ordinary form of policy does not authorise a deviation from the usual course of voyage, and a very wide authority to deviate will not entitle a ship to go practically outside the voyage insured altogether.[4] When the cause excusing or justifying deviation or delay ceases to operate, the ship must resume her course and prosecute her voyage with reasonable despatch (s. 50).

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[1] *Newbigging* v. *M'Gregor & Co.*, 1822, 1 Sh. App. 117.
[2] Act, ss. 42, 48; *Hyderabad Co.* v. *Willoughby*, [1899] 2 Q.B. 530.
[3] Cf. *Mentz, Decker & Co.* v. *Maritime Insurance Co.*, [1910] 1 K.B. 132.
[4] *The "Dunbeth,"* [1897] P. 133.

Section 11.—Commencement of Risk.

737. In the case of time policies, this is settled by the date from which the policy runs. The rules under voyage policies require fuller statement. When the subject-matter is insured "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and so that the risk shall not be materially varied, otherwise the insurer may avoid the contract (s. 42). *A fortiori*, the contract may be voided by such delay as is evidence of an abandonment of the voyage insured. The implied condition may be negatived by shewing that the delay was caused by circumstances known to the insurer before the contract was concluded, or that he agreed to the delay. In an insurance "from" a particular place the risk does not attach until the ship starts on the voyage insured.[1] The start must be *bona fide*, but once the ship has broken ground in order to proceed on the voyage the risk has begun. In the case of an express warranty to sail from a port by a given date the vessel must be outside the port by the date.[2] Where a ship is insured "at and from" a place, either a port, or it may be a district, and the ship is at the place in good safety when the contract is concluded, the risk attaches immediately. If she is not there at the time, the risk attaches as soon as she arrives, provided she is in a state to lie in reasonable safety,[3] and, unless the policy otherwise provides, whether or not she is covered by another policy for a time after arrival. Where, however, a ship was insured by a "port" policy while "at L.," and by another policy from L., it was held she ceased to be covered by the former policy the moment she broke ground to sail on her outward voyage, though still within L. when a loss occurred.[4] Where in a contract two days are mentioned as the dates on which a period is to begin and end, it is a question of the intention of the parties whether these days are included.[5] Reference may be made to two cases [6] as to the construction of the common clause by which the ship is covered for thirty days in port after arrival.

738. The rules with regard to the insurance of chartered freight are the same as those applicable to ship. When freight other than chartered freight is insured "at and from" a particular place the risk attaches *pro rata* as the goods are shipped, but if there be cargo in readiness which belongs to the shipowner, or if some other person has agreed with him to ship cargo, the risk attaches as soon as the ship is ready to receive such cargo.[7] When goods or other moveables are

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[1] Act, Rule 2, First Schedule.
[2] *Moir* v. *Royal Exchange Assurance Co.*, 1814, 4 Camp. 84.
[3] Act, Rule 3, First Schedule.
[4] *Hunting & Son* v. *Boulton*, 1895, 1 Com. Cas. 120.
[5] *Scottish Metropolitan Insurance Co.* v. *Stewart*, 1923, 39 T.L.R. 407.
[6] *Cornfoot* v. *Royal Exchange Assurance Corporation*, [1903] 2 K.B. 363; *S.S. "Kynance" Co.* v. *Young*, 1911, 16 Com. Cas. 123.
[7] Act, Rule 3, First Schedule.

insured "from the loading thereof" the risk does not attach until the goods are on board, and the insurer is not liable for them while in transit from the shore to the ship unless the policy so provides.[1]

739. In this as in other cases under the contract the parties are at liberty to make such arrangements as they see fit within the limits of legality, and their bargain will be given effect to. Underwriters may bargain to take practically all risks.[2] The risk may be bargained to begin only on a particular date; and as has been incidentally seen, the insurers frequently cover the risk of preliminary transits, of storage, of transit from shore to ship of goods, the risk of chartered freight, long before the ship reaches her port of loading, etc. In these cases the real question at issue is often one already considered, viz. the insurable interest of the assured. Sometimes to avoid double insurance where a ship is being covered inwards and outwards, the risk on the latter policy is declared to commence only when that on the former ceases. A ship insured to the port of Greenock and at it for thirty days after arrival, having started during the thirty days to leave the port, was damaged, and the question arose was she at the time of damage still in port.[3] It was there held that a port in mercantile contracts is not necessarily extended or restricted to the custom-house or legal limits of the particular port, but is the port as understood by mercantile and seafaring men. Where the policy gives, as it often does, a general description of various ports or places at which the risk may commence or end in the ship's option, what is within the description is to be gathered in the same way. In the absence of usage the ordinary meaning will be given to the terms used.[4]

Section 12.—Termination of Risk.

740. In all policies the risk ceases in ordinary cases in accordance with the bargain made—in voyage policies as regards the ship after she has been moored at anchor in the port of destination for twenty-four hours in good safety, and as regards goods until the same be discharged and safely landed. In the latter case they must be landed in the customary manner and within a reasonable time after arrival, and if they are not so landed, the risk ceases. What answers to the term "good safety" has been the subject of more than one decision.[5] In time policies the risk may cease on one policy and that on another policy commence when the ship is at sea in the course of a voyage. In cases where the ship sails on a voyage and is never afterwards heard of, it is a question of fact at what time the ship is to be deemed lost, depending on the whole circumstances and presumptions of the case.[6] It is possible to

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[1] Act, Rule 4, First Schedule. [2] *Schloss Bros.* v. *Stevens*, [1906] 2 K.B. 665.
[3] *Hunter* v. *Northern Marine Insurance Co.*, 1888, 13 App. Cas. 717.
[4] Cf. *Crocker* v. *The General Insurance Co. of Trieste*, 1897, 3 Com. Cas. 22.
[5] *Lidgett* v. *Secretan*, 1870, L.R. 5 C.P. 190.
[6] *Reid* v. *Standard Marine Insurance Co.*, 1886, 2 T.L.R. 807.

imagine that the assured might in such a case be unable to prove against either set of insurers, but the latter generally arrange as to the liability, while it is not uncommon in time policies to provide—in cases of twelve months' policies an illegal provision—that the ship is to be covered until her arrival in port, after the specified time runs out.

Section 13.—Perils Insured Against.

741. These depend on the will of the parties as expressed in the policy. But in the first instance it is proposed to deal with these enumerated in the form. That form, as has been stated, is contained in the First Schedule annexed to the Act, and the Schedule states rules for construction of the policy. By s. 30 of the Act, subject to its provisions and unless the context otherwise requires, the terms of the policy as set forth in the Schedule are to have the scope and meaning stated in the rules.

Subsection (1).—*Perils of the Seas.*

742. "All perils, losses, and misfortunes of a marine character or of a character incident to a ship as such" has been suggested as a definition of perils of the sea.[1] In a question under a charter, an incursion of sea water into a ship due to the action of rats, without negligence on the part of the ship, was held a peril of the sea.[2] A collision with another ship or other object [3] is within the words. The admission of water into a ship through a stopcock left open by the negligence of the engineer was held in a policy on goods to be either a peril of the sea or covered by the general words at the end to be hereafter noticed.[4] Intentional admission of sea water, as by scuttling, has been held not to be a "peril of the sea." [5] Claims for damages by collision against an insured ship for damage done by the negligence of those in charge of her are not within the ordinary terms of the policy, but are covered by a special clause. So damage by the insured ship to a pier or other such object is neither covered by the ordinary policy nor by the collision clause, but is usually insured with Protection Clubs. Reference may be made to the illustrations of risks within or beyond the policy given when dealing with the doctrine of *proxima causa*. The policy, speaking generally, will cover all fortuitous accidents or casualties of the seas whereby the subject-matter insured is damaged. But it will not include the ordinary action of the wind or waves.[6] It covers risks which may, not those which must, happen. In a case where a steamer insured by a time policy sailed with an insufficient supply of bunker coal, and in consequence, and from, it was held, no special

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[1] *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 1887, 12 App. Cas. 484, per Lord Bramwell.

[2] *Ibid.*; cf. *The "Thrunscoe,"* 1897, 13 T.L.R. 566.

[3] *Wilson, Sons & Co.* v. *Owner of Cargo per The "Xantho,"* 1887, 12 App. Cas. 503.

[4] *Davidson* v. *Burnand*, 1868, L.R. 4 C.P. 117.

[5] *Samuel* v. *Dumas*, [1924] A.C. 431.

[6] Act, Rule 7, First Schedule.

action of the wind or seas, had to accept aid from another ship and to pay her salvage, this was held not to be a loss by a peril of the sea.[1] It has been held that a claim which shipowners had to pay in respect of salvage of life under the Merchant Shipping Act, 1894, s. 544, is not a peril insured against under the ordinary form of policy.[2] There is of course no doubt that sums which the insured have to pay for the salvage of the subject-matter insured from perils insured against form a claim on the insurer. But it has been held that the claim on this head is one in respect of loss by perils insured against,[3] and not one for charges under the suing and labouring clause (s. 78).[4]

Subsection (2).—*Restraint of Princes, etc.*

743. A group of excepted risks is stated as follows: "Men-of-war, enemies, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainment of all kings, princes, and people of what nation, condition, or quality soever." These are mainly war risks.[5] Capture is the typical example of a loss by men-of-war, etc. In connection with the risks there were various express warranties—"Warranted to sail with convoy," *e.g.* where the assured warranted the ship from capture and seizure, and the master having barratrously engaged in a smuggling adventure, the ship was seized, it was held that, though barratry was one of the perils insured against, and there was a loss by barratry, the warranty freed the insurers, as capture or seizure was the proximate cause of the loss.[6] The words used are to be read like the terms in the policy in their natural sense.[7] Insurers will not be liable for loss by perils insured where the assured at the time of the insurance are alien enemies, or become so after the insurance is effected. In the one case it is illegal to enter on the contract. In the other, once the war breaks out, the policy becomes void.

744. Arrests, restraints, and detainments are distinguished from the war risks proper by this, that there is supposed in the case of an arrest to be an intention to restore the property some time or other to the assured, or to make compensation. The acts are not generally acts of an enemy of the country of the assured, but in connection, it may be, with hostilities against another country. One example is a case where the subject-matter insured was detained in Paris because of the siege, and this was held a loss within the policy which covered land transit,[8] though it was argued that it was within the principle

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[1] *Ballantyne* v. *Mackinnon*, [1896] 2 Q.B. 455.

[2] *Nourse* v. *Liverpool Sailing Ship Owners' Association*, [1896] 2 Q.B. 16.

[3] *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 755.

[4] See para. 770, *infra*.

[5] See para. 724, *supra*.

[6] *Cory* v. *Burr*, 1883, 8 App. Cas. 393; see also *Johnston* v. *Hogg*, 1883, 10 Q.B.D. 432.

[7] *Cf.* as to warranty against contraband, *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Co.*, [1908] 2 K.B. 504; also *Anderson* v. *Marten* (warranty against capture), [1908] A.C. 334.

[8] *Rodocanachi* v. *Elliott*, 1873, L.R. 8 C.P. 649.

applied to a ship turned away from her port of destination, to be immediately noticed. An embargo by which a government interdicts ships from sailing from a particular port is the ordinary example of a peril insured against by arrests and restraints of princes, rulers, and people.[1] The terms used refer to political or executive acts of the government, and do not include a loss caused by riot or by ordinary judicial process.[2] Contraband of war was being carried to Yokohama under a bill of lading, by which "restraints of princes" were excepted. The ship was at Hong-Kong when war was declared between China and Japan. It was well known she had contraband for Yokohama on board, and Chinese men-of-war were about. The master discharged the contraband at Hong-Kong, and it was held by Mathew J. that he was prevented delivering the goods by the excepted peril.[3] It has, however, been held in this country that the risks insured do not cover a ship, because of blockade or of reasonable fear of capture, failing to reach her port of destination, and there being in consequence a loss on goods insured or of freight.[4]

Subsection (3).—*Fire.*

745. This term does not cover a fire caused by the inherent vice of the subject-matter insured. It includes fire voluntarily caused to avoid capture by an enemy. There has been keen litigation over the question whether or not an explosion of machinery was covered by the ordinary policy, either by this term or by the general words at the end of the enumeration. It has now been finally held that such damage is not covered by the ordinary policy.[5] In this case the damage was to a donkey pump air-chamber which burst. In a previous case there was an explosion of steam which did serious damage, and this was held to be either within the term "fire" or the general words; but it must now be held overruled.[6]

Subsection (4).—*Pirates—Rovers.*

746. It has been said that perils from pirates are covered by perils of the seas. This is true also of others of the enumerated risks. The same peril may fall under more than one of those specified. Risk from pirates includes mutiny of passengers, and loss from rioters from shore.[7] But loss due to the acts of persons who operated against the property of a State for a political end is not within the word, nor covered by the general words as *ejusdem generis* with pirates.[8]

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[1] *Sanday & Co.* v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781.
[2] Act, Rule 10, First Schedule.
[3] *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q.B. 326.
[4] *Becker, Gray & Co.* v. *London Assurance Corporation*, [1918] A.C. 101.
[5] *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 1887, 12 App. Cas. 484.
[6] *West India and Panama Telegraph Co.* v. *The Home and Colonial Marine Insurance Co.*, 1880, 6 Q.B.D. 51.
[7] Act, Rule 8, First Schedule.
[8] *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co.*, [1909] 1 K.B. 785.

SUBSECTION (5).—*Thieves.*

747. It is said there must be something of violence in the theft to bring it within the cover of the insurance, and so the word thieves does not include, without special words, theft by either passengers or crew, such theft being of a character preventible by due care, and of so ordinary a kind as not to be insured.[1] Where the words used were "thieves of whatever kind, whether on board or not, or by land or sea," this was held not to exempt a shipowner from liability for theft by stevedores' men employed by him, but this decision, in part, at least, proceeded on the fact that it was the contract of affreightment which was under consideration.[2]

SUBSECTION (6).—*Jettison.*

748. This is a peril of the sea, or within the general words, though specially enumerated. It has been dealt with under the head of General Average. See AVERAGE.[3]

SUBSECTION (7).—*Barratry of the Master and Mariners.*[4]

749. It has been held that, when a mortgagee was insured, he could recover for loss due to the barratry of the master who was also owner, having taken part in his appointment.[5] Where a charterer is not the employer of the master, and the act alleged to be barratrous is done with the privity of the shipowners, the loss due to the fraud of the master is not barratry.[6] It is otherwise if the charterer is to be deemed *pro hac vice* owner, and the master's employer.

SUBSECTION (8).—*Other Perils.*

750. " All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage " of the subject-matter insured. Wide as are those general words, they are restricted to losses *ejusdem generis* with some one of these which have gone before.[7] They "cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."[8] Their application has been illustrated once or twice already in dealing with the particular perils. One or two more illustrations may be given. In *Cullen's* case[8] a British ship and goods were sunk by another British ship firing upon the ship insured by mistake for an enemy. The loss was held within the general words, as also was that where dollars were thrown overboard

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[1] *Taylor* v. *Liverpool and Great Western Steam Co.*, 1874, L.R. 9 Q.B. 546 ; Act, Rule 9, First Schedule.

[2] *Steinman & Co.* v. *Angier Line*, [1891] 1 Q.B. 619.

[3] See Vol. II. p. 29, *ante*.

[4] Act, Rule 11, First Schedule.

[5] *Small* v. *United Kingdom Marine Mutual Insurance Association*, [1897] 2 Q.B. 311.

[6] Cf. *Hobbs* v. *Hannan*, 1811, 3 Camp. 93.

[7] Act, Rule 12, First Schedule.

[8] *Cullen* v. *Butler*, 1816, 5 M. & S. 461, per Lord Ellenborough.

to avoid capture by the enemy.[1] The same was held with respect to a ship in a graving dock, which by the violence of the wind was thrown over on her side and injured by striking the ground.[2] Loss of freight due to coals having so heated as, though not on fire, to require to be discharged and sold at an intermediate port, has been held covered either by the risk of fire or the general words.[3]

Subsection (9).—*Special Bargains.*

751. As has been said, and as has more than once been incidentally seen, the risks actually undertaken by the insurers may differ widely from those that have now been referred to. In each case what the risks are depends on the terms of the policy. As the result of certain cases a special clause known as "The Inchmaree Clause," [4] is frequently introduced to cover expressly the dangers and accidents incident to steam navigation; to meet another case [5] the warranty of seaworthiness may be waived *quoad* latent defects. The supposed effect of the clause, inserted to obviate the result of *The Inchmaree* judgment, has been minimised by recent decisions.[6] In other cases the insurers free themselves from special risk.

752. One class of risk, that of live stock, may be specially referred to. In this case, under the ordinary policy nice questions have arisen as to whether or not the loss is to be held proximately due to perils insured against or to natural causes, though indirectly brought about by the course of events in transit.[7] Sometimes, to avoid such questions, special bargains are made enlarging or restricting the insurer's obligations. In one case "all risks" were insured, and the insurers were held liable under the suing and labouring clause for extra fodder supplied because of the protracted character of the voyage [8]—a case which stands out in contrast to the ordinary rule that the shipowner or other assured is allowed no claim in respect of extra expense or loss because of detention or delay on the voyage due to perils insured, *e.g.* for wages or keep of crew, or by way of demurrage; or for injury to perishable goods.[9] Meat shipped at Hamburg for London was delayed on the voyage by tempestuous weather, and solely thereby became putrid. The loss was held uncovered.[10] So also the loss due to the fact that

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[1] *Butler* v. *Wildman*, 1820, 3 B. & Ald. 398.

[2] *Phillips* v. *Barber*, 1821, 5 B. & Ald. 161; *Napier* v. *Wood*, 1825, 4 S. 19.

[3] *The "Knight of St. Michael,"* [1897] P. 30; *Iredale* v. *China Traders' Insurance Co.*, [1900] 2 Q.B. 512. *Cf.* on the whole subject—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 1887, 12 App. Cas. 484.

[4] *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, *supra.*

[5] *The "Glenfruin,"* 1885, 10 P.D. 103.

[6] *Oceanic S.S. Co.* v. *Faber*, 1906, 11 Com. Cas. 179; *Hutchins Bros.* v. *Royal Exchange Assurance Co.*, [1911] 2 K.B. 398.

[7] Cf. *Laurence* v. *Aberdeen*, 1821, 5 B. & Ald. 107; *Gabay* v. *Lloyd*, 1825, 3 B. & C. 793.

[8] *The "Pomeranian,"* [1895] P. 349.

[9] Also as to all risk policies—*Schloss Bros.* v. *Stevens*, [1906] 2 K.B. 665; *St. Paul Fire and Marine Insurance Co.* v. *Morice*, 1906, 11 Com. Cas. 153.

[10] *Taylor* v. *Dunbar*, 1869, L.R. 4 C.P. 206.

full freight has to be paid on goods which arrive *in specie* at their destination, however damaged, is in no way one covered by the ordinary policy so as to be brought into calculation with insurers.[1]

753. Another special risk which in practice always forms the subject of agreement with insurers is that of claims against a shipowner in respect of collision between his ship and another (see COLLISION AT SEA).[2] The word "collision," as used in a policy, includes collision between a ship and another ship temporarily sunk.[3] It does not cover damage to nets attached to a vessel when there is no contact between the hulls.[4] The ordinary clause does not cover a claim against underwriters for money paid by the assured as part of the damages due to collision between his ship and another in respect of expenditure to remove the wreck of the injured ship.[5] But where an insured vessel collided with another vessel and that other vessel as a result collided with a third vessel, the underwriters of the insured vessel were held liable to relieve the insured vessel in terms of the collision clause of the amount payable to both vessels.[6]

SECTION 14.—TOTAL LOSS.

754. Losses due to perils insured may be either total or partial. Total loss includes both actual and constructive total loss; and unless a different intention appears from the terms of the policy, an insurance against total loss only includes a constructive total loss (s. 56). A ship founders at sea, and ship and cargo are lost, or having sailed, the ship is never heard of again. In such cases there is no room for doubt—the loss is an actual total loss (s. 58). But if the ship is wrecked and so irreparably damaged that she has ceased to be a ship, and is only what has been called a "congeries of planks," or if the cargo, in like manner from perils insured, has ceased to answer to the denomination under which it was assured, *e.g.* hides which have putrefied,[7] there is an actual total loss, which needs no notice of abandonment (s. 57).[8] The assured recover for a total loss, of course crediting any sum they may receive for the salvage, or accounting for it to the insurers. It is said that the same result follows when goods are so damaged that they cannot reach the port of discharge in a state to answer to the denomination under which they are insured. In most cases the question may be of no practical importance, as immediate sale may be the only course to follow. But cases can be figured where goods which cannot be forwarded so as to keep their denomination may so answer to their denomi-

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[1] *Farnworth* v. *Hyde*, 1866, 18 C.B. (N.S.) 835; L.R. 2 C.P. 204.

[2] See Vol. III. p. 493, *ante*.

[3] *Chandler* v. *Blogg*, 1897, 3 Com. Cas. 18.

[4] *Bennett Steamship Co.* v. *Hull Mutual Steamship Protecting Society*, [1914] 3 K.B. 57.

[5] *Burger* v. *Indemnity Mutual Marine Assurance Co.*, [1900] 2 Q.B. 348; see also *Tatham, Bromage & Co.* v. *Burr*, [1898] A.C. 382.

[6] *France, Fenwick & Co.* v. *Merchants Marine Insurance Co.*, [1914] 3 K.B. 827.

[7] *Roux* v. *Salvador*, 1836, 3 Bing. N.C. 266.

[8] *Montreal Light, Heat and Power Co.* v. *Sedgwick*, [1910] A.C. 598.

nation at the place where they are as to make the loss, if total at all, only a constructive total loss. Improved means of communication certainly affect the question of actual or constructive total loss, and render it proper to give notice of abandonment in all cases when the subject-matter assured is of some value and the question of total or partial loss of practical importance. If before notice can be given a justifiable sale takes place, that is, a sale which was necessary, the want of notice will not affect the question whether or not there has been total loss. No notice need be given if in point of fact at the time when notice falls to be given there is nothing to abandon (s. 62).

755. Capture of, and an embargo for an indefinite period on, a ship, are cases of constructive total loss. In the case of damage to a ship—including such a case as stranding—the test is, What would a prudent uninsured owner do? Would he sell her as she lies, because the expense to which he would be put in making her fit for use as a ship would exceed, or probably exceed, her value when so fit? If yes, there is a constructive total loss, and the owner can abandon. But the whole circumstances must be reasonably taken into account—the fact, *e.g.*, that cargo will pay part of the expense by way of general average.[1] A ship stranded on a sandy beach on the Indian coast very shortly before the monsoon burst. It was at the moment in a high degree probable that she would be broken up by the force of the monsoon, but nothing could be reasonably done until the effect of the monsoon was seen. The owner abandoned. Thereafter the monsoon burst without injuring the ship, which was got off comparatively little damaged. It was held that as a prudent uninsured owner would have waited to see what happened when the monsoon broke, the abandonment was premature.[2] It is generally stipulated in the policy that the insured value is to be taken as the sound value. In the case of freight there will be a constructive total loss if there is a loss of ship but a possibility of forwarding the goods to their destination by another ship. There is a total loss of freight in the case of a total loss of the goods on which the freight is being earned.

756. The Act provides that, subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value (s. 60). Policies usually lay down that the insured value is to be looked to. In subsection (2) particular cases are specified. At the date of the Act there stood a decision of the Court of Appeal[3] to the effect that the value of the wreck was not an element to be taken into consideration in judging what the prudent uninsured owner would do. Since the Act the House of Lords, dealing with a case which arose prior to the

[1] *Kemp* v. *Halliday*, 1866, L.R. 1 Q.B. 520.
[2] *Shepherd* v. *Henderson*, 1881, 9 R. (H.L.) 1; 7 App. Cas. 49.
[3] *Angel* v. *Merchants' Marine Insurance Co.*, [1903] 1 K.B. 811.

Act, overruled *Angel's* case.[1] The Act (s. 60 (ii)) declares the law in conformity with *Angel's* case, so that the case of *Macbeth & Co.* cannot now be applied.[2]

757. In cases of constructive total loss of goods or subjects of insurance other than ship, the test is said to be whether or not the subject-matter is so damaged or affected by a peril insured against that, having regard to cost, it is not reasonable to require the adventure to be prosecuted to its termination—that is, that a prudent uninsured owner would not so prosecute it. The fact that goods which reach their destination have, by perils insured, got mixed with others, so that it is impossible to say which particular goods are the property of the assured, will not make the case one of total loss (s. 56). There can only be a total loss of goods which have reached their destination if they have ceased to answer to their denomination.[3]

758. Where there is a constructive total loss, the assured may either treat it as a total or a partial loss. In the former case he must make his election within a reasonable time, and must give notice of abandonment (s. 61). Assuming that the notice of abandonment is not given timeously, but that thereafter the state of matters changes substantially for the worse, it is thought that the assured can of new elect to treat the case as one of total loss, and recover by giving notice of abandonment.[4] If the loss becomes an actual total loss he certainly can claim a total loss.[5] The policy may, and sometimes does, make special bargains in relation to this matter of total loss and to the test to be applied so as to modify the ordinary rules. In a recent case where "profit on freight" was insured by a policy which was warranted free from average, the loss of part of the freight, causing a loss of the profit on freight to the assured, was held a total loss within the policy, though this would not have been so had the insurance been on freight *per se*.[6] It was argued that in the case of profits on goods insured there must be a total loss of all the goods to make a total loss of profits on them, but it is submitted that after *Asfar's* case the terms of the insurance in each case should be looked at.[7]

759. However much there may in one sense have been a total loss to the assured, it is no loss under the contract unless due to perils insured. Goods greatly damaged have to pay full freight, but this is not an item which can be considered in calculating the question of total loss, though all reasonable expenses of conditioning damaged goods, and extra freight and charges if the goods have to be transhipped in order to be forwarded, must be brought into the calculation.[8] So there is no

[1] *Macbeth & Co.* v. *Maritime Insurance Co.*, [1908] A.C. 144.
[2] *Hall* v. *Hayman*, [1911] 2 K.B. 5.
[3] *Asfar* v. *Blundell*, [1896] 1 Q.B. 127; *Francis* v. *Boulton*, 1895, 1 Com. Cas. 217.
[4] *Stringer* v. *English and Scottish Marine Insurance Co.*, 1870, L.R. 5 Q.B. 599.
[5] *Cossman* v. *West*, 1887, 13 App. Cas. 160.
[6] *Asfar* v. *Blundell*, *supra*.
[7] Cf. *Smith & Scaramanga* v. *Fenning*, 1898, 3 Com. Cas. 75.
[8] *Farnworth* v. *Hyde*, 1866, L.R. 2 C.P. 204.

actual total loss of freight by the perils insured if the goods reach their destination and the freight is earned. There is no loss at all under the policy of freight if, *e.g.*, the voyage has not been completed because the master, acting reasonably, has sold the cargo damaged by perils insured against, although it could have been brought forward *in specie* to its destination. The loss is due to the master's act. So also if the master, not being able to reach the port of destination because of blockade, brings the voyage to an end elsewhere, and loses his freight. These are illustrations only of a rule of law already examined in other connections, and applicable here.

Section 15.—Abandonment.

760. On the subject of abandonment [1] general rules will be shortly stated. Notice of abandonment may be given verbally, or in writing, and in any terms which sufficiently indicate the assured's intention to abandon the subject-matter insured unconditionally to the insurers. The notice must be given promptly; but when the information before the assured is of a doubtful or vague character, he is entitled to reasonable time for inquiry and verification before he gives notice. The notice, once given, cannot be withdrawn without the insurer's consent. Once accepted, the insurers are held to have admitted the loss and the sufficiency of the notice of abandonment. The acceptance may be either express, or implied from acts, *e.g.* by dealing with the ship as their own.[2] But where the insurers salved the ship, giving intimation that their operations were without prejudice to their declinature of the abandonment, this was held not to be acceptance.[3] Notice of abandonment may be waived by the insurers.

761. It was decided in the Court of Session that in Scotland, as in England, if there is any material change in the state of matters between the time of notice of abandonment and that of action brought which affects the validity of the notice, it is the state of matters at the latter date which determines the question;[4] but the case was appealed to the House of Lords, and the House, while affirming the judgment, expressly reserved the question what was the law of Scotland on this point. The Act also leaves the point open. There is no doubt that the law of England is in conformity with the decision of the Court of Session, but equally little that the trend of Scots law, in conformity with that of most foreign countries, was in favour of the view that the proper *punctum temporis* was the time of notice of abandonment; and when the question comes up for final judgment this view may well prevail, particularly looking to opinions expressed by learned Lords in the case under consideration. In practice the difficulty is generally got over by underwriters agreeing to accept the state of matters at the time of notice as that to be considered. The House of Lords further held that

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[1] Act, s. 62. [2] *Robertson* v. *Royal Exchange Assurance Corporation*, 1925 S.C. 1.
[3] *Shepherd* v. *Henderson*, 1881, 9 R. (H.L.) 1; 7 App. Cas. 49.
[4] *The Sailing Ship "Blairmore" Co.* v. *M'Credie*, 1897, 24 R. 893; 25 R. (H.L.) 57.

underwriters could not at their own hand and by their expenditure change a total constructive loss into a partial loss.[1]

762. It has also been decided that where a ship was captured and notice of abandonment given and action brought, but after the action had been raised the ship was restored, the assured could nevertheless recover for a total loss.[2] The effect of abandonment in vesting the property in the insurers will be considered below when dealing with the subrogation of the insurers to the rights of the assured generally.[3]

Section 16.—Partial Loss.

Subsection (1).—*Particular and General Average.*

763. A partial loss may be either a particular average or a general average loss (s. 64). As we have seen, a partial loss, in the option of an assured, may in certain cases be a constructive total loss, and a partial loss may be 100 per cent. of the sum insured, indeed it may exceed this.[4] But of course the insurers are in no case liable for more than 100 per cent. and their proportion of suing and labouring charges, so far as damage at one time from perils insured against is concerned. A particular average loss is a loss caused by a peril insured against which is not a general average loss and which falls exclusively on the assured, giving him no right of contribution against other persons who may be interested in the common marine adventure. A sum payable for salvage proper is recoverable in the same way as a particular average loss (s. 65). As to general average (see Average),[5] where a ship on fire was scuttled by the port authorities, with the master standing by, but deeming the course taken that best for all concerned, this was held a case for general average contribution.[6] Where a ship had to put back for repairs and got icebound, the expense of breaking up the ice to get the ship out was held not the subject of general average contribution.[7]

Subsection (2).—*Memorandum Clause.*

764. By this clause, as printed in the form, certain perishable goods are warranted free from particular average, certain other goods free from average under 5 per cent., and all other goods, also ship and freight, free from average under 3 per cent. in each case, unless general or the ship be stranded.[8] In the cases where special goods are enumerated as free from average under a certain percentage there must be a sufficient percentage damaged of each species. Thus, if there is a cargo composed partly of sugar and partly of flax, and the sugar is damaged over, but the flax under, 5 per cent., there is a claim

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[1] *Sailing Ship "Blairmore" Co.* v. *M'Credie, supra.*
[2] *Ruys* v. *Royal Exchange Assurance Corporation*, [1897] 2 Q.B. 135.
[3] See para. 772 *et seq., infra.*
[4] *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 755.
[5] Vol. II. p. 29, *ante.*
[6] *Papayanni & Jeromia* v. *Grampian S.S. Co.*, 1896, 1 Com. Cas. 448.
[7] *Westoll* v. *Carter*, 1898, 14 T.L.R. 281.
[8] Act, Rules 13 and 14, First Schedule.

in the one case and not in the other. But where the cargo is not made up of enumerated articles, different species can be dealt with in whole, so that the percentage can be averaged over all. The meaning of the words corn, etc., is that given to them by usage.

765. The warranty from average varies according to the bargain. Sometimes the insurance is against total loss only. Very commonly a particular average claim is allowed not only when the ship is stranded, but when she is sunk, burnt, or in collision. Where there is a warranty from particular average, the assured cannot recover for a total loss of part, unless the contract is that the insurance is to be apportionable. Separate valuations of parts imply apportionment.[1] Loss of part of the master's effects insured entitles him to recover, notwithstanding the warranty.[2] Agreement or usage may make the contract apportionable. The warranty does not interfere with the recovery of salvage charges, though, as we have seen, these are not general average, or of particular charges and expenses reasonably incurred under the suing and labouring clause in order to avert a loss insured against (ss. 64, 65). Under the ordinary clause a general average loss or liability cannot be added to a particular average loss to make up the 3 per cent. or 5 per cent. specified.[3] But in the case of a voyage policy successive losses may be added, and in the case of a time policy so may successive losses on the same voyage, but not those on different voyages.[4]

766. Salvage charges and particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded from the calculations as to the specified percentage. Particular charges are charges incurred on a special part of the adventure to lessen damage or to avert a peril insured. But conditioning charges and other expenses incurred at the port of destination, which diminish the loss to an extent exceeding the charges and expenses, may be added to the loss eventually ascertained. Of course this means that the loss would have been within the insurance but for these expenses, and therefore it is not fair to ignore them. In truth, the goods are just so much damaged by the perils insured because these expenses have to be incurred.

767. A ship is stranded which takes the ground out of the ordinary course and remains fast, though it may be only for a very short time. But stranding is really a question of fact.[5] It is not a stranding for a ship to take the ground in the ordinary way in a tidal river where ships at states of tide do this. Nor is it a stranding if the ship is not pulled up for any appreciable time, but just touches the ground and goes on.[6] If, on the other hand, there was no reason to anticipate that the ship should ground where she did, or if she grounds in an extraordinary

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[1] *Ralli* v. *Janson*, 1856, 6 El. & Bl., 482.

[2] *Duff* v. *Mackenzie*, 1857, 3 C.B. N.S. 16.

[3] *Price & Co.* v. *A1 Ships' Small Damage Insurance Association*, 1889, 22 Q.B.D. 580.

[4] *Stewart* v. *Merchants' Marine Insurance Co.*, 1885, 16 Q.B.D. 619.

[5] *Cf.* Lord Tenterden in *Wells* v. *Hopwood*, 1832, 3 B. & Ad. 20, at p. 34; and *Lechford* v. *Oldham*, 1880, 5 Q.B.D. 538, at p. 545.

[6] *M'Dougle* v. *Royal Exchange Assurance*, 1815, 4 Camp. 283.

way, and if she remains fast for even a few minutes, this is a stranding.[1] It is not a grounding or stranding for a vessel to sink in deep water.[2] The effect of a stranding is to let in claims for particular average, though the loss is unconnected with the stranding, provided the goods, in the case of a policy on goods, were on board the ship at the time of the stranding.[3] In the case of a ship and of a policy on time the particular average must be in the course of the voyage in which the stranding takes place. Special clauses are often introduced into policies on time dealing with what a voyage is to mean, or it may be excluding all particular average under 3 per cent.

768. The words "unless the ship be sunk, burnt, or in collision" have no technical meaning, and it is a question of fact whether or not the ship has been sunk, burnt, or in collision, as the case may be. A ship is not "burnt" merely because some part of her happens to go on fire, *e.g.* a part of the cross bunkers.[4]

Section 17.—Cumulative Losses.

769. Under the ordinary policy the insurers are liable for successive losses, though the total amount of such losses may exceed the sum insured. Thus they are liable, after having made good a partial loss of, say, 30 per cent., to pay in full a total loss. Where, however, under the same policy a partial loss which has not been repaired or made good, and in respect of which the assured is not under obligation which will involve him in loss under it, is followed by a total loss, the insurers are only liable for the total loss, *e.g.* the insurers would not be liable for the cost of repairing a ship partially damaged which had been totally lost before anything was done to make good the damage; but they would be liable for a general average expenditure, which the assured had still to pay notwithstanding the total loss (s. 77). If, however, the partial loss is claimable under one policy, and the total under another, both can be recovered.[5]

Section 18.—Suing and Labouring Clause.

770. It is the duty of the assured and his agents in all cases to take reasonable measures for the purpose of averting or minimising a loss, and they cannot recover for damage so far as it has been aggravated by want of care in these respects. The ordinary policy contains a suing and labouring clause which is deemed to be supplementary to the contract of insurance, and under it the insured may recover from the

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[1] Cf. *Baker* v. *Towry*, 1816, 1 Stark. 436; *De Mattos* v. *Saunders*, 1872, L.R. 7 C.P. 570.

[2] *Baker Whiteley Coal Co.* v. *Marten*, 1910, 26 T.L.R. 314, per Pickford J.

[3] *The "Alsace Lorraine,"* [1893] P. 209; *Thames and Mersey Marine Insurance Co.* v. *Pitts, Son, & King*, [1893] 1 Q.B. 476.

[4] *The "Glenlivet,"* [1894] P. 48.

[5] *Lidgett* v. *Secretan*, 1870, L.R. 5 C.P. 190; *Woodside* v. *Globe Insurance Co.*, [1896] 1 Q.B. 101.

insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss or that the insurance may be warranted free from particular average either generally or under a specified percentage. But the expenses must be incurred to avert a loss covered by the policy. Expenses to diminish a partial loss, which there is no reason to think could become a total loss, will not be recoverable under a policy which covers total loss only (s. 78). Reference may be made to an elaborate judgment of Mr. Justice Willes on the scope and effect of the clause.[1] General average and salvage charges proper are not expenses within the clause, but if the salvage services are rendered on an agreement as to remuneration and on the employment of the assured or his agents, they may, it is submitted, be expenses under the clause.[2] The cost of litigation in regard to salvage falls to be distributed among ship, freight, and cargo in proportion to contributing values.[3]

Section 19.—Adjustment of Losses.

771. This subject has been separately treated of.[4] Where a ship sustains a particular average loss which is followed by a general average sacrifice making her a constructive total loss, the amount to be made good to the ship in general average is the difference between her sound value and the cost of repairing the particular damage less the amount realised by her sale as a total loss. In such a case no deduction of one-third for new for old should be made.[5] Underwriters fall to pay the full amount of dock dues where work is done on the ship in dock both to repair the damage from perils insured and also for other purposes for which docking is necessary.[6]

Section 20.—Subrogation of Insurers in Rights of Assured.

772. The fact that the contract of marine insurance is primarily one of indemnity is brought perhaps most prominently under notice in this connection.[7] In the case of constructive total loss the right has a special importance, because before the assured can claim a total as distinguished from a partial loss he has to give timeous notice that he vests the subject-matter of the insurance in the insurer, but the right, in substance, is the same in all cases. In cases of partial loss, though the assured remains vested in the property, the insurers get the benefit

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[1] *Kidston* v. *Empire Insurance Co.*, 1866, L.R. 1 C.P. 535; 1867, L.R. 2 C.P. 357.

[2] *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 755, at p. 761.

[3] *Hick* v. *The London Assurance Corporation*, 1895, 1 Com. Cas. 244.

[4] *Cf.* Average, Vol. II. p. 29, *ante*.

[5] *Henderson Bros.* v. *Shankland & Co.*, [1896] 1 Q.B. 525.

[6] *Ruabon S.S. Co.* v. *The London Assurance Corporation*, [1900] A.C. 6, distinguishing *The Marine Insurance Co.* v. *China Transpacific S.S. Co.*, 1886, 11 App. Cas. 573.

[7] Act, s. 79. See *Castellain* v. *Preston*, 1883, 11 Q.B.D. 380, for a full exposition of the subject; also *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation*, [1907] 2 K.B. 814.

of every right which the assured has by which the loss can be lessened to the extent of their interest, *e.g.* in the case of a general average sacrifice, say, of part of the ship, the insurers get the benefit of the assured's right to contribution. So in the case of actual total loss the salvage vests in the insurer on payment by him, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of the subject-matter assured as from the time of the casualty causing the loss. Exactly the same result follows in the case of constructive total loss once the abandonment is accepted or determined to be good. In all cases the insurers to the extent of their interest are subrogated in the rights of their assured so as to give them relief, and they may use all the remedies which the assured can use in order that they may recover from anyone liable to the assured the sum which they have paid. They are, in short, in the same position as a surety.[1]

773. Some illustrations will serve to make clear the principles. In the case of loss of goods, where there is a claim under the contract of carriage against the shipowner, the insurer can have this claim enforced in his interest. In the case of collision the insurer of ship or goods can claim the benefit of the remedy against the wrong-doing ship. In one case a ship was insured for £6000 and valued at that sum. Through the fault of another ship she became a total loss. The insurers paid the £6000. In the action against the wrong-doing ship, though £9000 was held to be the true value of the ship, the insurers were held entitled to the whole sum recovered.[2] The soundness of this judgment has been challenged, but it has not been overruled.[3] There can be no doubt that the rule so applied may place the assured in an awkward position where the subject-matter has been insured under two policies at different valuations, but the remedy may in some cases be found in claiming only a partial loss. Separate valuations require in all cases careful consideration. Another apparently hard case for the assured is where the ship, though a constructive total loss, earns the freight by reaching her destination after the casualty and delivering the goods. In such a case the insurers can claim the freight which has been earned.[4] On the other hand, the assured cannot claim from the freight insurers, for the freight having been earned there is no loss of freight, at least none proximately due to perils insured;[5] but the hull insurers cannot claim the freight if it is earned by means of transhipping the goods into another ship and carrying them on to their destination, nor can they claim the damages for loss of freight awarded to the shipowner, *e.g.* in case of collision.[6]

774. It is held that the contract of affreightment is personal to the shipowner, and does not pass by the abandonment, and the hardship

[1] *Darrell* v. *Tibbitts*, 1880, 5 Q.B.D. 560.
[2] *North of England Assurance Association* v. *Armstrong*, 1870, L.R. 5 Q.B. 244.
[3] Cf. *Burnand* v. *Rodocanachi*, 1882, 7 App. Cas. 333.
[4] *Stewart* v. *The Greenock Marine Insurance Co.*, 1848, 2 H.L.C. 159.
[5] *Scottish Marine Insurance Co. of Glasgow* v. *Turner*, 1853, 1 Macq. 334.
[6] *Sea Insurance Co.* v. *Hadden*, 1884, 13 Q.B.D. 706.

is thus so far limited. It is only if the ship herself earn the freight that the insurers get it, because it is their property which has completed the work upon completion of which alone freight is due. In such a case the insurers are only liable for disbursements necessary to earn the freight incurred after the date of the casualty, but they cannot claim prepaid freight.[1] If the ship is carrying goods of the shipowner, the insurers can claim a *quantum meruit* remuneration for the carriage of the goods as from the time the casualty happened till their delivery, but not full freight.[2] The subrogation extends to benefits received by the assured in a sense voluntarily, if with a view to lessen the loss, *e.g.* an allowance made by Government,[3] but the insurers cannot claim a gift to the assured clearly made to benefit him beyond the indemnity given by the insurers, and not to diminish the loss they have made good.[4] A Scots case [5] may be referred to as shewing how the rights of insurers and assured were worked out where the insurer of a portion of the risk accepted abandonment, but the case ultimately was dealt with as regards the bulk of the insurers as one of partial loss, and the assured disregarded the rights of the insurers who had accepted abandonment in that part of the ship to which their insurance was proportionate. The insurers cannot claim to rank on the fund paid into Court by a shipowner one of whose ships has collided with another insured by them, but belonging to him, where by fault of the former, damage, excluding that to the second ship, has been done to an amount exceeding the statutory limit of liability. To allow the insurers relief in such a case would just be to allow them to claim from the assured relief in respect of the negligence of his agents.[6]

775. It has been more than once held that shipowners, who in case of total loss have abandoned to the insurers the ship, have thereby freed themselves from responsibility for the expense of raising wreck or doing other work under such Acts as the Harbours, Docks, and Piers Clauses Act, 1847,[7] which it is held throw the expense on the owners at the time it is incurred. The question arises, Are the insurers necessarily bound to become owners of the wreck, so as to incur the further liability for such expenses over and above total loss? That question does not seem to have been formally decided, but it is submitted that the abandonment is for the insurers' benefit, and that if they take the proper steps they cannot be forced to accept either ship or other subject-matter insured if this will entail a burden and not a benefit. It may be that a mere declinature of abandonment in ordinary form might not suffice, for that refers to a denial that there is a total loss more than to a refusal to take the salvage. But if insurers formally intimated that they declined to take

[1] *The* "*Red Sea*," [1896] P. 20.
[2] *Miller* v. *Woodfall*, 1857, 27 L.J. Q.B. 120.
[3] *Randal* v. *Cockran*, 1748, 1 Ves. Sen. 98.
[4] *Burnand* v. *Rodocanachi*, 1882, 7 App. Cas. 333.
[5] *Whitworth Bros.* v. *Shepherd*, 1884, 12 R. 204.
[6] *Simpson* v. *Thomson*, 1877, 3 App. Cas. 279.
[7] *The* "*Crystal*," [1894] A.C. 508; *Howard Smith* v. *Wilson*, [1896] A.C. 579.

the salvage or to have anything to do with it, it is thought they would be held free from any liability connected with it. This is the view of Mr. Phillips, the well-known American writer on the subject, and it was also that of Mr. M'Lachlan, the editor of Arnould.[1] In many cases special Harbour Acts make clear the liability of owners.

776. The insurer of a mortgagee's interest in, say, a ship, is, to the extent of any sum paid by him, entitled to be subrogated to the mortgagee's personal claim on the shipowner for the debt; but in general the insurance is effected in the joint interest of mortgagor and mortgagee.

777. If the particular insurer pays more than his due proportion of the loss in a question with his co-insurers, *e.g.* in a case of double insurance, he can recover the difference from those who have underpaid.

Section 21.—Return of Premium.[2]

778. In the ordinary case where the insurer does not run any part of the risk he has agreed to bear, he must return the premium of insurance if it has been paid, and he cannot recover it if not paid. In England this rule may have been based on the doctrine of failure of consideration, which has not the same place in Scots law as in English, but the law in the two countries is identical, and now rests on the provisions of the Act. The question to be answered in general is, Has the risk attached? A ship insured from a port is wrecked before she sails, and the premium is returned. If, however, she starts, but immediately after deviates, there is no return. If the premium is apportionable to different parts of the risks expressly or by usage, and the risk is not run *quoad* any part, the premium apportionable to that part is returnable. Where part of the subject-matter insured has not been put at risk there is a proportionate return of premium. So also where there are port and voyage risks and separate rates of premium and the latter risk is not run. If the policy is voided by the breach of the implied warranty of seaworthiness the premium must be returned. So also if the assured has no insurable interest. If he has only part insurable interest there may be a return of part. There will be no return in any case if there has been either fraud or illegality on the part of the assured or his agents. By illegality is meant that the adventure or contract is illegal or struck at by statute. In such a case the Courts decline to interfere. The assured is, however, under no obligation to run the risk so as to let the insurer earn the premium, nor does it prevent him from claiming return that there has been concealment or misrepresentation, unless there has been fraud on his part. The parties may of course bargain as to return of premium, and in point of fact there are clauses introduced into policies on the subject. If an assured is over insured he can get a return of part of the premium, but this is subject to qualification where there is double insurance.

[1] Arnould, 6th ed., p. 977. [2] Act, ss. 82–84.

Section 22.—Mutual Insurance Associations.[1]

779. Brief as this article necessarily is, it would be incomplete without reference to the development of insurance by means of mutual associations. There have been such associations for long. But latterly their progress has been enormous. In one way or another the special risks which shipowners run have been minimised, insured, or distributed over so large area as to prevent in the ordinary case heavy losses falling on any one owner. The risks the associations cover are exclusive of those covered by Lloyd's policy in ordinary form, and it is due to this that more than one question as to the protection given by such a policy has been settled by decision. The associations very generally make special provision with regard to the terms of the contracts of affreightment entered into by their members to secure that these contain such clauses exemptive of liability for negligence of crew and other matters as are practicable. Beyond that they cover in one way or another every variety of loss and risk to which the shipping trade is subject. Small damage claims; claims in respect of loss or injury to life; of damage to cargo on board the carrying ship; of collision, so far as not covered by the usual running-down clause; of injuries done to pier or harbour works, or the expense of removing a ship which is an obstruction in a channel; loss due to fault of the master or crew—in short, as some rules put it, "all losses incident to shipowning" may be covered, though it may be remarked these general words will be held limited by their context.[2] Nor is the protection limited to insurance proper; the costs of litigation to enforce claims for freight and demurrage, of legal inquiries in which the ship is interested, or of defending her from unjust claims, are fair examples of expenses which mutual clubs or associations agree to bear jointly for individual members.

780. Naturally there has been a good deal of litigation in connection with such associations, but the questions have in the main turned on the special words used in the rules or policy of the special association concerned, and it is impossible to do more than refer to some of them, *e.g.*: Action by manager;[3] right of member only to sue on mutual insurance policy;[4] stamp on association policy;[5] illegal association under Companies Acts;[6] specification of members' names in policy of association underwritten for them;[7] Are individual part owners liable for calls, or the managing owners only?[8] Right of assignee to

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[1] Act, s. 85.

[2] Cf. *Rogers & Co.* v. *British Shipowners' Mutual Protection Association*, 1896, 1 Com. Cas. 414.

[3] *Evans* v. *Hooper*, 1875, 1 Q.B.D. 45.

[4] *Montgomerie* v. *United Kingdom Mutual Steamship Association*, [1891] 1 Q.B. 376.

[5] *In re Teignmouth General Mutual Shipping Association*, 1872, L.R. 14 Eq. 148.

[6] *In re Arthur Average Association, etc.*, 1875, L.R. 10 Ch. 542.

[7] *Inverkeithing Marine and Freight Assurance Association* v. *Mackenzie*, 1882, 9 R. 1043.

[8] *Great Britain* 100 *A1 S.S. Insurance Association* v. *Wyllie*, 1889, 22 Q.B.D. 710; *British Marine Mutual Insurance Co.* v. *Jenkins*, [1900] 1 Q.B. 303; *North Eastern* 100 *A S.S. Insurance Association* v. *Red* "*S.*" *Steamship Co.*, 1906, 12 Com. Cas. 26.

sue.[1] Cases which have decided what is the true meaning of such phrases as improper or negligent navigation or management of a ship have been already treated of. See CARRIAGE BY SEA.[2] It may be noted that liability for improper stowage is frequently excluded by the rules of particular associations. In each case the rules of the association must be carefully examined, and their fair meaning will be given effect to, having regard, of course, to any decision on the meaning of particular phrases, and in general to the principles which underlie the law applicable to marine insurance.

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[1] *Laurie* v. *West Hartlepool Thirds Indemnity Association*, 1899, 4 Com. Cas. 322.
[2] See Vol. III. p. 26, *ante*.

INTERDICT.

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Section 1.—Nature of Action.

781. Interdict is the form of action adopted to stay execution of diligence at a stage when a simple suspension is not sufficient, or to prevent injury to any right. It has been termed a *quasi* criminal process, and any party in breach of an order of interdict is liable to censure, fine, and imprisonment.[1] The prayer for interdict must be in itself clear and definite and where it is too general it is not competent to refer to the statement of facts annexed to ascertain its precise application.[2]

782. In the Court of Session interdict is never concluded for alone. It may be combined with declaratory or rescissory conclusions in an ordinary action; occasionally it is found in the prayer of a petition for appointment of a judicial factor;[3] and most commonly it is used with a crave for suspension in the summary process of suspension and interdict.

Section 2.—Interdict to stay Execution of Diligence.

Subsection (1).—*Warrant for Sale.*

783. A simple suspension is the appropriate action to stop diligence, and should the charger persist after suspension he may be brought

[1] *Kelso School Board* v. *Hunter*, 1874, 2 R. 228; *Johnson* v. *Grant*, 1923, S.L.T. 501.
[2] *Cairns* v. *Lee*, 1892, 20 R. 16.
[3] *Smith* v. *Smith*, 1892, 20 R. 27.

before the Court on a petition and complaint and found liable in damages; but when a poinding has been executed and an order of sale obtained, interdict is also required to prevent the warrant being carried into effect.[1] When after a poinding the warrant for sale is applied for, objections may be taken before the Sheriff to the granting of the warrant,[2] and again, on the sale being reported, cause may be shewn to the Sheriff why the proceeds should not be paid to the poinding creditor.[3] Similarly in a sequestration for rent, when the landlord has sequestrated articles claimed by a third party, the proper remedy is to appear in the process before the Sheriff and claim the articles.[4] Once warrant for sale has been granted, the only process to stop the sale is a suspension and interdict or what Lord Pearson described as a combined suspension and suspension and interdict.[5]

Subsection (2).—*Warrant for Collection of Rates.*

784. As a remedy against diligence proceeding upon warrant for the collection of rates a note of suspension and interdict seems at all stages to be the appropriate process, even when diligence has only been threatened.[6] It has been decided that an action of declarator to determine the mode of assessment by a parochial board is not competent to an individual ratepayer. He has no complaint unless he is overcharged. A suspension and interdict is then the appropriate process, but if the complainer is not overcharged the Court will refuse the note without reference to whether the mode of assessment is right or wrong.[7] In *Ewing* v. *The Glasgow Commissioners of Police*,[8] it was held incompetent at the instance of individual ratepayers to challenge a resolution by the Commissioners authorising payment of expenses incurred by them in opposing unsuccessfully a Bill in Parliament. The action was one of suspension and interdict, and for an order on the Commissioners as individuals to pay back money so expended by them into the "funds of the police establishment." The Court held that the pursuers had no such direct and immediate interest as to entitle them to insist in the conclusions of the action. But in two cases, one a declarator and interdict and the other a suspension and

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[1] Mackay's Practice, ii. p. 212.

[2] Personal Diligence Act (1 & 2 Vict. c. 148), ss. 23–28; *Scotland* v. *Laurie*, 1828, 5 S. 961; *Kincaid* v. *Love*, 1835, 14 S. 188.

[3] *Sangster* v. *Burness*, 1857, 20 D. 355; *Anstruther* v. *Lewis*, 1851, 13 D. 778; 1 & 2 Vict. c. 114, s. 25.

[4] *Lindsay* (*C. & A. Christie's Tr.*) v. *Earl of Wemyss*, 1872, 10 M. 708; *Hoare* v. *Mackay*, 1905, 13 S.L.T. 588.

[5] *Hobbin* v. *Burns*, 1904, 11 S.L.T. 681; *Smith* v. *Flowerdew*, 1842, 5 D. 335; *Anderson* v. *Buchanan*, 1848, 11 D. 270; *Wilson* v. *Stronach*, 1862, 24 D. 271, at p. 275; Juridical Styles, iii. 456; Scots Style Book, vol. v, p. 108; C.A.S., E, ii. 1 (*c*), (*d*).

[6] *Glasgow Rly. Co.* v. *Parochial Board of Abbey Parish, Paisley*, 1850, 13 D. 304; *Leys* v. *Riddell*, 1851, 13 D. 630; *Neil* v. *Hamilton*, 1864, 2 M. 1081.

[7] *Stuart* v. *Parochial Board of Keith*, 1869, 8 M. 26; *British Fisheries Society* v. *Mags. of Wick*, 1871, 10 M. 426.

[8] 1837, 15 S. 389; 1839, M'L. & Rob. 847.

interdict, where the same question was raised but where the pursuers made the challenge in their own interest as individuals and not in the public interest, the proceedings were held competent.[1]

785. Questions have frequently arisen regarding the jurisdiction of the Court of Session to review the decisions of inferior judicatories and administrative bodies entrusted with statutory powers. Lord Shaw defined the Court's jurisdiction as follows: "It is within the jurisdiction of the Court of Session to keep inferior judicatories and administrative bodies right in the sense of compelling them to keep within the limits of their statutory powers, or of compelling them to obey those conditions without the fulfilment of which they have no powers whatsoever. It is within the power of the Court of Session to do that, but it is not within the power and function of the Court itself to do work set by the Legislature to be performed by those administrative bodies or inferior judicatories themselves."[2] It is not competent for a ratepayer who has not availed himself of the statutory forms of review provided by the Valuation Acts to have recourse to interdict or other ordinary common-law proceedings against the assessing authority.[3] But it has been held that an error of assessment and not of valuation may be competently reviewed in a suspension and interdict, there being no appeal in such a case to the Valuation Judges.[4]

786. The remedy in the case of diligence attempted or threatened for recovery of imperial taxation is a simple suspension, which will be brought in the Bill Chamber but, when passed, marked and transmitted to the Lord Ordinary on exchequer causes.[5]

Subsection (3).—*Grounds of Interdict.*

787. A suspension and interdict to stay execution may be founded upon (*a*) defect in the decree;[6] (*b*) defect in the charge;[7] (*c*) partial or total payment of the sum charged—in the case of partial payment interdict will be limited to the amount of such partial payment;[8] (*d*) any circumstances arising after the date of the decree which have partially or wholly extinguished the debt;[9] (*e*) defect in the execution of the poinding or the proceedings prior to the sale;[10] (*f*) excessive

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[1] *Stirling County Council* v. *Mags. of Falkirk*, 1912 S.C. 1281; *Farquhar & Gill* v. *Mags. of Aberdeen*, 1912 S.C. 1294; see also *Cowe* v. *Corporation of Renfrew*, 1906, 8 F. 905; and *Grahame* v. *Mags. of Kirkcaldy*, 1882, 9 R. (H.L.) 91, at pp. 95–96, per Lord Watson.

[2] *Moss's Empires* v. *Assessor for Glasgow*, 1917 S.C. (H.L.) 1, at p. 11; *Lord Advocate* v. *Police Commrs. of Perth, etc.*, 1869, 8 M. 244; *Holroyd* v. *Mags. of Edinburgh*, 1921, S.L.T. 259; *Farquhar & Gill* v. *Mags. of Aberdeen*, *supra*.

[3] *Dante* v. *Assessor for Ayr*, 1922 S.C. 121.

[4] *Sharp* v. *Latheron Parochial Board*, 1883, 10 R. 1163; *Hope* v. *Corporation of Edinburgh*, 1897, 5 S.L.T. 195; *Abercromby* v. *Badenoch*, 1909, 2 S.L.T. 114.

[5] 19 & 20 Vict. c. 56, s. 21; *Renfrew & Brown* v. *Mags. of Glasgow*, 1861, 23 D. 505; *Borthwick* v. *Lord Advocate*, 1862, 1 M. 94.

[6] Graham Stewart on Diligence, p. 278. [7] *Ibid.*, p. 291.

[8] *Dick* v. *Murison*, 1845, 8 D. 1; *Wilson* v. *Stronach*, 1862, 24 D. 271; *Haughhead Coal Co.* v. *Gallacher*, 1903, 11 S.L.T. 156.

[9] Maclaren, Bill Chamber Practice, p. 9. [10] *Sangster* v. *Burness*, 1857, 20 D. 355.

poinding;[1] (*q*) delay in reporting the poinding to the Sheriff;[2] (*h*) delay in obtaining warrant to sell;[3] (*i*) defect in the warrant to sell;[4] (*j*) insufficient notice of the sale;[5] (*k*) that the goods poinded are not the property of the debtor or are subject to rights which preclude poinding;[6] but subject to the exceptions mentioned above,[7] the Court will not necessarily grant an interdict on account of omissions of unimportant details of procedure.[8]

Subsection (4).—*Title of Complainer.*

788. The complainer must own a right of property in the goods poinded or at least such a right in them as precludes either actual or constructive possession in the debtor and therefore renders poinding incompetent.[9] A tenant having retained his rent on the ground that the landlord had not implemented his obligation to put the subjects rented in sufficient repair, the landlord threatened sequestration; the tenant obtained a note of suspension and interdict passed on consignation and caution.[10]

Section 3.—Interdict to prevent Infringement of Rights.

Subsection (1).—*Grounds required.*

789. "Interdict is a remedy by decree of Court, either against a wrong in course of being done or against an apprehended violation of a party's rights, only to be awarded on evidence of the wrong or on reasonable grounds of apprehension that such violation is intended."[11] It must be shewn that the act or acts complained of were done deliberately and not merely as the result of carelessness or thoughtlessness,[12] and that the damage arising is appreciable.[13] Actual injury need not be averred if reasonable ground for anticipation of such injury is set forth.[14] But it is not sufficient to aver anticipation of contingent injury that may never arise.[15] A plea of *non valens agere* has been

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[1] *M'Kinnon* v. *Hamilton*, 1866, 4 M. 852; *Le Conte* v. *Douglas & Richardson*, 1880, 8 R. 175.

[2] *Sampson* v. *M'Cubbin*, 1822, 1 S. 407 (N.E. 381); *Lyle* v. *Greig*, 1827, 5 S. 845 (N.E. 785); *Miller* v. *Stewart*, 13 S. 483.

[3] *Henderson* v. *Grant*, 1896, 2 F. 659.

[4] *Kewlay* v. *Andrew*, 1843, 5 D. 860; *M'Vicar* v. *Kerr*, 1857, 19 D. 948; *M'Kinnon* v. *Hamilton*, *supra*.

[5] *M'Neill* v. *M'Murchy*, 1841, 3 D. 554.

[6] *Smith* v. *Flowerdew*, 1842, 5 D. 335; *Anderson* v. *Buchanan*, 1848, 11 D. 270; *M'Donald* v. *Urquhart*, 1852, 15 D. 191.

[7] See para. 783, *supra*.

[8] *M'Knight* v. *Green*, 1835, 13 S. 342.

[9] Mackay's Manual, p. 446; *Smith* v. *Manson*, 1862, 1 M. 1038; *Hunter* v. *North of England Banking Co.*, 1849, 12 D. 65; *Thomson* v. *Christie*, 1858, 20 D. 1256; *Preston* v. *Gregor*, 1845, 7 D. 942.

[10] *Gray* v. *Renton*, 1840, 3 D. 203.

[11] *Hay's Trs.* v. *Young*, 1877, 4 R. 398; *Macleod* v. *Davidson*, 1886, 14 R. 92, per Lord Young at p. 95; Mackay's Manual, p. 448; Maclaren, Bill Chamber Practice, p. 51.

[12] *Ibid.*, *Bass, Ratcliff & Gretton* v. *Laidlaw*, 1908, 6 S.L.T. 660.

[13] *Steuart* v. *Stephen*, 1877, 4 R. 875; *Williams* v. *Macrae*, 1885, 12 R. 1051.

[14] *Singer Manufacturing Co.* v. *Kimball & Morton*, 1873, 11 M. 267; *King* v. *Hamilton*, 1844, 6 D. 399; *Hoyle* v. *Shaws Water Co.*, 1854, 17 D. 83.

[15] *Hood* v. *Traill*, 1884, 12 R. 362.

repelled, however, where a proprietor had acquiesced in an operation that constituted an admitted nuisance, though during the period of acquiescence it did not seriously inconvenience the occupation of his property.[1] The Court has declined to pronounce interdict, even when a legal right to it has been made out, in a case where they considered that declaratory findings were sufficient for the pursuer's protection.[2] Where an infringement of a trade name had been innocently committed it was held that the infringer must, in order to avoid interdict, withdraw the representations made and undertake that they would not be repeated, and that the withdrawal would be given equal publicity with the representations complained of.[3]

Subsection (2).—*Must be timeous.*

790. Interdict is not competent against an act practically completed before the presentation of the note,[4] but, even though interim interdict may not have been granted, the effect of final interdict carries back to the presentation of the note on the maxim *pendente lite nihil innovandum.*[5] The Court, however, has an equitable jurisdiction, which it will exercise in special cases, the more readily, when a public interest is involved, of refusing interdict even when the complainer may in strict law be entitled to it. It has been held that it is not a sufficient ground for exercising this equitable jurisdiction that the inconvenience or loss to the party resisting the interdict will be out of all proportion to the loss caused to the other party from refusing interdict.[6]

791. In determining what is timeous a distinction must be observed between continuous acts acquiesced in and acts which, though not continuous, may be repeated. Continuous acts, as for example, the abstraction of water from a stream, acquiesced in for a considerable period, may not be interdicted.[7] Acts not continuous, but capable of repetition, as an act of trespass, may be interdicted at any time.[8]

Subsection (3).—*Reinstatement.*

792. The Court of Session Act, 1868, s. 89, provides: Where a respondent in any application or proceeding in the Bill Chamber,

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[1] *Harvie* v. *Robertson*, 1903, 5 F. 338.

[2] *Perth General Station Committee* v. *Ross*, 1897, 24 R. (H.L.) 44, per L.C. at p. 46; and Lord Watson at p. 50. [3] *John Kindhaugh & Co.* v. *Robert Inch & Son*, 1923, S.L.T. 667.

[4] *Hoyle* v. *Shaws Water Co.*, 1854, 17 D. 83; *Lawson's Trs.* v. *Cramond*, 1863, 3 M. 53; *Begg* v. *Jack*, 1874, 1 R. 366; *Dick* v. *Thom*, 1829, 8 S. 232.

[5] *Glen* v. *Caledonian Rly. Co.*, 1868, 6 M. 797; *Grahame* v. *Mags. of Kirkcaldy*, 1882, 9 R. (H.L.) 91, at p. 94.

[6] *Grahame* v. *Mags. of Kirkcaldy*, *supra*; *Bank of Scotland* v. *Stewart*, 1891, 18 R. 957; *Glen* v. *West Highland Rly. Co.*, 1895, 2 S.L.T. 489; *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1897, 25 R. 370.

[7] *Hoyle* v. *Shaws Water Co.*, *supra*; *Presbytery of Dunoon* v. *Campbell*, 1844, 6 D. 1262; *Blackburn* v. *Finlay*, 1848, 10 D. 590; *Harvie* v. *Robertson*, 1903, 5 F. 338, per Lord Adam at p. 344; Lord Kinnear at p. 346.

[8] *Dickson* v. *Dickie and Ors.*, 1863, 1 M. 1157; *Farquhar & Gill* v. *Mags. of Aberdeen*, 1912 S.C. 1294.

whether before or after the institution of such proceeding or application, shall have done any act which the Court in the exercise of its preventive jurisdiction might have prohibited by interdict, it shall be lawful for the said Court, or for the Lord Ordinary on the Bills, upon a prayer to that effect, in the note of suspension and interdict, or in a supplementary note, to ordain such respondent to perform any act which may be necessary for reinstating the complainer in his possessory right, or for granting specific relief against the illegal act complained of.

793. An order under this section is ancillary to a process of suspension and interdict, and can only be asked in a competent interdict process timeously presented.[1] An order for reinstatement has been refused when the operation complained of was completed before the cause was heard in the Inner House.[2] In another case where the laying of a water pipe had been completed after presentation of the note of suspension and interdict and after interim interdict had been refused, the Inner House, having found that the laying of the pipe was illegal, upon a supplementary note ordered the removal of the pipe.[3] The considerations which may weigh with the Court in granting or refusing an application for reinstatement are dealt with by the judges of the Court of Session and House of Lords, in the case of *Grahame* v. *The Magistrates of Kirkcaldy* before referred to.[4]

Subsection (4).—*Title of Complainer.*

794. The complainer in a suspension and interdict must shew (*a*) a legal title; a mere interest will not do,[5] though it is not necessary that his title should be completed at the time of the presentation of the note;[6] (*b*) that there has been an invasion of his property by a party having no right or title thereto, or, as against a party pleading a competing title, that he, the complainer, has had possession in virtue of his title for at least seven years prior to the attempt to innovate on his possession.[7] A landlord has been held entitled to interdict in respect of a nuisance complained of by his tenant,[8] and a superior is entitled to interdict to protect the subject of a feu even without the consent of his vassal.[9] Ratepayers, but not rival traders, have been held entitled to sue an action of interdict against Harbour Trustees where their

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[1] *George Heriot's Trust* v. *Carter and Ors.*, 1903, 10 S.L.T. 514.

[2] *Caledonian Rly. Co.* v. *Glasgow and South-Western Rly. Co.*, 1903, 11 S.L.T. 510.

[3] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, *supra.*

[4] 1881, 8 R. 395; 1882, 9 R. (H.L.) 91, per Lord Watson at pp. 94–95; see also *Jack* v. *Begg*, 1875, 3 R. 35.

[5] Maclaren, Bill Chamber Practice, p. 51; *Anstruther* v. *East of Fife Rly. Co.*, 1852, 1 Macq. 98; *Graham* v. *Warnock Bros.*, 1926, S.N. 1.

[6] Maclaren, *op. cit.*, p. 51; *Cranston & Elliot* v. *Dobson*, 1899, 2 F. 271; *Mackay* v. *Mackay*, 1914 S.C. 1001.

[7] *Colquhoun* v. *Paton*, 1859, 21 D. 966, per Lord Cowan at p. 1001; *Graham* v. *Warnock Bros.*, *supra.*

[8] *M'Ewen* v. *Steedman & M'Alister*, 1912 S.C. 115; 1913 S.C. 761.

[9] *Marquis of Breadalbane* v. *Campbell*, 1851, 13 D. 647.

patrimonial interests were affected.[1] Two proprietors having a common interest in fishing in part of a river may combine as complainers in an action to protect their common interest but not to protect their separate rights of fishing in other portions of the river.[2]

795. Third parties having an interest may be sisted as respondents.[3]

Subsection (5).—*When Declarator is necessary.*

796. When the title of the complainer is not clear suspension and interdict is not a competent process, and an action of declarator with which a crave for interdict may be conjoined is the appropriate remedy.[4] The Court has, however, in a number of cases relaxed this rule and allowed a question of title to be tried in a suspension and interdict.[5]

797. Summary procedure by note of suspension and interdict "cannot be competently resorted to, when the state of possession cannot truly be alleged to have been inverted or innovated upon, or to be endangered and when the actual rights of the contending parties permit of being made the subject of judicial determination in the ordinary and accustomed form of action for the trial of competing rights and claims." [6]

798. An *actio popularis* is not competent in Scotland.[7] An interdict obtained against certain named parties and others cannot be enforced against any but the parties named.[8] An opinion was expressed by Lord Colonsay that, when an action of declarator and interdict brought to determine a public right of way is tried upon the issue whether there is a right of way or not, the verdict and judgment upon that point, when allowed to become final, is a conclusive settlement of that question against all parties.[9]

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[1] *D. & J. Nicol* v. *Dundee Harbour Trs.*, 1914 S.C. 374; 1915 S.C. (H.L.) 7, per Lord Dunedin at p. 12 *et seq.*

[2] *Arthur and Ors.* v. *Thomas Aird and Ors.*, 1907 S.C. 1170.

[3] *Gas Power and By-Products Co., Ltd.* v. *Power Gas Corporation, Ltd.*, 1911 S.C. 27; but see *Laing's Sewing Machine Co.* v. *Norrie & Sons*, 1877, 5 R. 29.

[4] Rankine on Land-Ownership, 4th ed., p. 13; *Cruickshank* v. *Irving*, 1854, 17 D. 286; *Green* v. *Shepherd*, 1866, 4 M. 1028, per Lord Justice-Clerk Inglis; *Lovat* v. *Fraser*, 1845, 8 D. 316; *Grierson* v. *School Board of Sandsting, etc.*, 1882, 9 R. 437; *Scott* v. *M'Dowall*, 1857, 19 D. 769; *Cronin* v. *Sutherland*, 1899, 2 F. 217.

[5] *Earl of Fife* v. *Mags. of Banff*, 1829, 8 S. 137; *Ministers of Edinburgh* v. *Mags. of Edinburgh*, 1836, 16 S. 400; *Colquhoun* v. *Paton*, 1853, 16 D. 206; *Colquhoun* v. *Paton*, 1859, 21 D. 996; *Earl of Stair* v. *Austin*, 1881, 8 R. 683; *Thurlow* v. *Tait*, 1893, 1 S.L.T. 62.

[6] *Burrows* v. *Colquhoun*, 1852, 14 D. 791, 24 Sc. Jur. 442, per Lord Cowan, approved by L.C. Cranworth; 1 Macq. 691, at p. 694; *Ligerwood* v. *Lanarkshire and Dumbartonshire Rly. Co.*, 1903, 11 S.L.T. 55; *Sibbald* v. *Mags. of Dundee*, 1907, 14 S.L.T. 734.

[7] *Burgesses of Inverury* v. *Magistrates*, 14th December 1820, F.C.; *Ewing* v. *Glasgow Commrs. of Police*, 1837, 15 S. 389; 1839, M'L. & Rob. 847; *Cowe* v. *Corporation of Renfrew*, 1906, 8 F. 905; *Grahame* v. *Mags. of Kirkcaldy*, 9 R. (H.L.) (Lord Watson, pp. 95–96); see also *Stirling County Council* v. *Mags. of Falkirk*, 1912 S.C. 1281; and *Farquhar & Gill* v. *Mags. of Aberdeen*, 1912 S.C. 1294.

[8] *Pattison* v. *Fitzgerald and Ors.*, 1823, 2 S. 536 (N.E. 468).

[9] *Jenkins* v. *Robertson and Ors.*, 1867, 5 M. (H.L.) 27, at pp. 34–35.

SUBSECTION (6).—*Interdict founded on Statutes.*

799. "The Court will not in general grant an interdict which is merely an echo of a statutory provision. An interdict must be directed against some specific act which is alleged to be in contravention of the statute and not merely against doing anything which is contrary to the statute. The reason is obvious. The party interdicted must be told plainly what are the acts which he is enjoined not to do in order that he may regulate his conduct in conformity with the interdict." [1]

SUBSECTION (7).—*Interdict of Arbitration Proceedings.*

800. It is competent to interdict an arbitration before it begins when it appears plain on the face of the matter that the arbiter has no such power as that which he is called upon to exercise,[2] but the tendency of judicial opinion has been against raising the matter *ab ante* by interdict and towards considering the question after it has been before the arbiter himself.[3] After proceedings have commenced the Court will only in very clear cases stop them by interdict.[4] Where an arbiter refuses to exercise the full powers given him he may be interdicted just as when he exceeds his authority.[5]

SUBSECTION (8).—*Companies.*

801. While the Court will always be prepared to enforce regularity in the statutory proceedings of public companies, where the provisions of the statutes are fulfilled it will only with great reluctance interfere with the domestic control of the company.[6]

SUBSECTION (9).—*Jurisdiction.*

802. A foreigner may be interdicted from doing a wrong in Scotland without the necessity of using arrestments to found jurisdiction against him.[7] It is competent to interdict a person subject to the jurisdiction

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[1] *Fleming* v. *Liddesdale District Committee*, 1897, 24 R. 281, per Lord M'Laren at p. 283.

[2] *Donaldson's Hospital* v. *Esslemont*, 1925 S.C. 199; 1926 S.C. (H.L.) 68; *Hendry* v. *Walker*, 1927, S.L.T. 333; 1926 S.N. 157.

[3] *Glasgow and South-Western Rly. Co.* v. *Caledonian Rly. Co.*, 1871, 44 Sc. Jur. 29, per Lord Neaves; *Christison's Tr.* v. *Callendar Brodie*, 1906, 8 F. 928, per Lord Dunedin at p. 931; *Sinclair* v. *Clynes Trs.*, 1887, 15 R. 185; *Leask and Ors.* v. *Swan and Anor.*, 1908, 16 S.L.T. 388.

[4] *Dumbarton Water Commrs.* v. *Lord Blantyre*, 1884, 12 R. 115; *Wemyss* v. *Ardrossan Harbour Co.*, 1890, 20 R. 500; *Glasgow, Yoker and Clydebank Rly. Co.* v. *Lidgerwood*, 1895, 23 R. 195; *Caledonian Rly. Co.* v. *Morrison*, 1898, 25 R. 1001; *Licenses Insurance Corporation* v. *Shearer*, 1907 S.C. 10.

[5] *Birkmyre Brothers* v. *Moore & Weinberg*, 1907, 14 S.L.T. 702; *Adams* v. *Great North of Scotland Rly. Co.*, 1890, 18 R. (H.L.) 1, per Lord Halsbury at p. 6, and Lord Watson at p. 8.

[6] Palmer's Company Law, 12th ed., pp. 173 and 210, and cases there referred to.

[7] *Toni Tyres, Ltd.* v. *Palmer Tyres, Ltd.*, 1905, 7 F. 477; *Waygood* v. *Bennie*, 1885, 12 R. 651.

of the Scottish Courts against the commission of a wrongous act abroad, *e.g.* prosecuting an action in foreign Courts.[1] Prorogation of jurisdiction by a foreigner forms a good foundation for interdict.[2]

SUBSECTION (10).—*Cases where Interdict held Competent.*

803. It has been held competent in a declarator and interdict to declare the limits of an obligation on the complainer to maintain a bridge and to interdict the respondents from using the bridge for heavy traffic beyond such limit.[3] In a recent case regarding the bridges over the Caledonian Canal where the circumstances were very similar a note of suspension and interdict was passed and interim interdict granted by Lord Moncrieff.[4] In another case it was held competent in a suspension and interdict to try the question of the validity of a written undertaking by a schoolmaster to resign office at the age of sixty and the schoolmaster was interdicted from entering the school premises. The schoolmaster challenged the validity of the letter on the ground of essential error.[5] A note of suspension and interdict against repeating a slander is competent.[6] Neighbouring frontagers and members of the community as such have been held entitled to interdict against a frontager on both sides of a street connecting his separate properties by a covered bridge forty-seven feet above the roadway.[7] A suspension and interdict to interdict a Sheriff on the ground of no jurisdiction from proceeding with an application to record a memorandum of agreement under the Workman's Compensation Act has been held competent.[8] An aerated water manufacturer was found to have a good title to interdict a drysalter filling with paraffin a bottle belonging to and bearing the name of the manufacturer, the bottle having been brought to the drysalter by a customer purchasing paraffin, but the drysalter being aware that the manufacturer was the owner of the bottle and that he objected to its being used for such a purpose.[9]

SUBSECTION (11).—*Cases where Interdict held Incompetent.*

804. Interdict has been held incompetent in the following cases: at the instance of a minority of a Town Council to prevent a bailie, elected by the majority of the Council to fill a vacancy, from acting;[10]

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[1] *Lindsay* v. *Paterson*, 1840, 2 D. 1873; *Young* v. *Barclay*, 1846, 8 D. 774; *Carron Iron Co.* v. *M'Laren*, 1855, 5 (H.L.) 416, at p. 436; *Dawson's Trs.* v. *Macleans*, 1860, 22 D. 685; *Liqrs. of the Pacific Mining Co., Ltd.* v. *Walker*, 1886, 13 R. 816.

[2] *Gill* v. *Cutler*, 1895, 23 R. 371.

[3] *London, Midland and Scottish Rly. Co.* v. *Turnbull*, 1926, S.L.T. 264.

[4] *Minister of Transport* v. *MacIntyre & Sons*, 22nd November 1927 (unreported).

[5] *Education Authority of Dumfriesshire* v. *Wright*, 1926, S.L.T. 217.

[6] *Lindsay* v. *Hastie*, 1915, 2 S.L.T. 264 and 266.

[7] *Donald & Sons and Ors.* v. *Esslemont & Macintosh, Ltd.*, 1922 S.C. 122.

[8] *Leask* v. *Swan*, 1908, 16 S.L.T. 388.

[9] *Wilson* v. *Shepherd*, 1913 S.C. 300.

[10] *Orr* v. *Vallance*, 1831, 10 S. 93; *Fleming* v. *Dunlop*, 1839, Macl. & Rob. 547.

but where two persons without the necessary qualification as proprietors within the parish were elected members of a Parochial Board interdict was granted against them so acting: [1] against a Sheriff proceeding to strike fiars prices according to usage but, as alleged, not in accordance with provisions of an Act of Sederunt; [2] to stop publication of reports of proceedings in a Court of Justice, British or foreign; [3] to interfere with a postmaster carrying out the instructions of his official superiors; [4] to prevent directors of a company implementing a decree of Court on the ground that the contract upon which the decree proceeded was outwith the scope of the powers of the company; [5] to stop the extracting of a final decree; [6] to stop the recording of an inhibition; [7] at the instance of a creditor, whose claim was unconstituted, against sale of goods belonging to his debtor on the averment that the purpose of the sale was to defeat the right of the creditors; [8] where a criminal prosecution is the appropriate remedy; [9] to stop proceedings under a statute for the construction of a public work within the powers of the statute which provided only the remedy of indemnification for loss sustained; [10] against a Sheriff fulfilling any ministerial duty enjoined by Act of Parliament; [11] to restrain a Local Authority from refusing an application to prevent the demolition of dwelling-houses under the Housing (Additional Powers) Act.[12]

Section 4.—Interdict to stay Proceedings pending another Action.

805. It often happens that an interim order for interdict is required while the matter at issue between the parties is tried in an action of declarator or reduction or other ordinary action. As such an interim order can only be obtained in an action originating in the Bill Chamber [13] a note of suspension and interdict craving interim interdict will have to be presented there. In such an application the title of parties and the other circumstances founded on will fall to be canvassed in the principal action, and a *prima facie* case only will be required to justify the Court in pronouncing an interim order in the suspension and inter-

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[1] *Gilmour* v. *Craig*, 1852, 24 Sc. Jur. 261.
[2] *Mylne* v. *Horne*, 1850, 12 D. 883.
[3] *Riddell* v. *Clydesdale Horse Society*, 1885, 12 R. 976.
[4] *Horne* v. *Macgregor*, 1908, 15 S.L.T. 961.
[5] *Graham* v. *North British Bank*, 1849, 11 D. 1165.
[6] *Goodsir* v. *Chalmers' Trs.*, 1821, 1 S. 15 (N.E. 12).
[7] *Craig* v. *Anderson*, 1776, 5 Bro. Sup., p. 482.
[8] *Macartney* (*for Commercial Bank*) v. *Gilchrist's Trs.*, 1831, 9 S. 646; *Morton* v. *Morton*, 1849, 11 D. 859.
[9] *Institute of Patent Agents* v. *Lockwood*, 1894, 21 R. (H.L.) 61.
[10] *Lord Douglas* v. *Dundee and Newtyle Rly. Co.*, 1827, 6 S. 329.
[11] *Cowdenbeath Gas Co., Ltd.* v. *Keir*, 1915, 1 S.L.T. 112; Maclaren, Bill Chamber Practice, p. 56.
[12] 9 & 10 Geo. V. c. 99, s. 6; *Holroyd* v. *Mags. of Edinburgh*, 1921, 1 S.L.T. 259.
[13] *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731, per Lord Pres. Dunedin at p. 750; C.A.S., C, ii. 11; D, i. 7.

dict.[1] After the note has been passed and interim interdict granted, process will be sisted in the Outer House pending the decision in the principal action.[2]

Section 5.—Interdict pending Appeal to House of Lords.

806. Entering an appeal to the House of Lords, and service of an order to answer, stop procedure in the Court of Session upon the decree or decrees appealed from, but in some cases an interdict may be required to preserve the *status quo* pending the appeal. Thus where an appeal was taken against a decree refusing to interdict a railway company from interfering with roads alleged not to fall under their statutory powers and against the railway company proceeding with a valuation trial, the note was held competent, though the interdict was refused.[3] In another case, where an interdict of a sale had been refused and an appeal was taken, interim interdict was granted.[4] The Court will exercise a wide discretion in the interest of all parties in granting or refusing interdict in these cases.[5]

Section 6.—Interdict in Exchequer.

807. The Lord Ordinary in Exchequer Causes may interdict any person from prosecuting in any Court other than his Court any causes appropriate to his Court alone.[6]

Section 7.—Interim Interdict.

Subsection (1).—*Generally.*

808. In an action of suspension and interdict the Lord Ordinary on the Bills has generally to consider the question of interim interdict on the presentation of the note, and again when it is passed into the Court of Session for trial. The Lord Ordinary in the Outer House before whom the cause may be depending may grant or recal interim interdict at any stage in the same manner and to the same effect and subject to the like review as is competent to the Lord Ordinary on the Bills.[7] Like powers are now possessed by the Divisions of the Inner House.[8] These powers can only be exercised in cases initiated in the Bill Chamber.[9]

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[1] *Mags. of Glasgow* v. *Commrs. of Police of Glasgow*, 1839, 1 D. 460; *Earl of Morton* v. *Anderson*, 1846, 8 D. 1249; *Sanderson* v. *Lees, etc.*, 1859, 22 D. 24; *Menzies* v. *Duff*, 1825, 5 S. 884; *Hume* v. *Mags. of Edinburgh*, 1856, 19 D. 50; *Deas and Ors., Princes Street Feuars* v. *Mags. of Edinburgh*, 1772, 2 Pat. 259.

[2] *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731; *M'Carroll* v. *M'Kinstery*, 1923 S.C. 94.

[3] *Campbell* v. *Edinburgh and Glasgow Rly. Co.*, 1855, 17 D. 790.

[4] *Innes* v. *Innes*, 1829, 7 S. 762.

[5] *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1856, 18 D. 325; *Glasgow and Londonderry Steam Packet Co.* v. *Clyde Shipping Co.*, 1859, 22 D. 2.

[6] 19 & 20 Vict. c. 56, s. 22. [7] C.A.S., C, ii. 11. [8] C.A.S., D, i. 7.

[9] *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trs.*, *supra*.

809. Interim interdict is always granted *periculo petentis*.[1] Interim interdict once granted persists until it is expressly recalled or until the action is finally disposed of.[2]

Subsection (2).—*Procedure.*

810. On presentation of a note of suspension and interdict, if a *prima facie* case of urgency is made out and there does not appear to be a probability of great hardship to the respondent, interim interdict is usually granted without caution, in order that the *status quo* may be preserved from the outset. If caution were ordered the interdict would not take effect until it had been found, and the interests of parties might be seriously affected.[3] On the other hand if the danger of loss to the respondent seems serious the Lord Ordinary may reserve as to interim interdict and shorten the *inducicæ*, in order that parties may be heard on answers at the earliest possible moment, or he may appoint a special hearing on interim interdict before answers are lodged. When the cause is heard on answers at the passing of the note the question of interim interdict and the conditions upon which it is to be granted or refused will be reconsidered in light of the answers lodged. The Lord Ordinary may then grant or recal interim interdict and attach such conditions regarding caution or otherwise as he sees fit.[4]

Subsection (3).—*Grounds for Interim Interdict.*

811. In determining the question of interim interdict the balance of convenience will always be the main consideration.[5] It is difficult to lay down rules which may not be set aside in any particular case, but the following considerations have weighed with the Court:

(1) Relevancy of the averments in the note is not, alone, a sufficient ground for interim interdict,[6] but relevant averments supported by documents or by admitted facts may be sufficient foundation,[7] and the Court may, as in cases of nuisance, remit to a man of skill to report before granting or refusing an interim order.[8]

(2) "If a settled state of possession is sought to be disturbed . . .

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[1] *Fife* v. *Orr*, 1895, 23 R. 8.

[2] *Clippens Oil Co., Ltd.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731, per Lord Pres. Dunedin at p. 750; *Home Drummond* v. *M'Lachlan*, 1908, S.C. 12.

[3] *Wilson* v. *Gilchrist*, 1900, 2 F. 391; C.A.S., E, ii. 21.

[4] *Baird* v. *Kerr*, 1877, 14 S.L.R. 434.

[5] *Adams* v. *Mags. of Glasgow*, 1868, 40 Sc. Jur. 524; *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418, p. 1425; *Mags. of Edinburgh* v. *Edinburgh, Leith and Granton Rly. Co.*, 1847, 19 Sc. Jur. 421, at p. 426; *Ferguson* v. *Buchanan*, 1924 S.C. 42, per Lord Pres. Clyde at p. 49.

[6] *Rankin* v. *M'Lachlan*, 1864, 3 M. 128, per Lord Justice-Clerk Patton at p. 133; *Seafield* v. *Kemp*, 1899, 1 F. 403, per Lord Kyllachy at p. 410.

[7] *Lindsay* v. *Robertson*, 1867, 5 M. 864, at p. 866.

[8] *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418; *Duke of Buccleuch* v. *Brown*, 1873, 1 R. 85.

the law will incline towards the continuance of such possession as against the pretensions of parties seeking to disturb it," [1] and this rule will apply even though the possession may have been "tortious in the assumption," if it has been open and peaceable and continued without objection for some time, unless the want of right is plain beyond all dispute.[2]

(3) Inversion of proper use may be a ground for interim interdict, as when a shop was let to be used as a silk mercer's and turned into a showroom for the exhibition of wax figures, or a building on a farm is used not for farm purposes, but as a posting station.[3]

(4) The public interest will always weigh with the Court where it is affected by a dispute.[4]

(5) If it appears that greater loss may be occasioned by granting interim interdict than by refusing, the Court may refuse interim interdict and order the respondent to find caution for any damage the complainer may sustain through his operations.[5] In patent cases this course is frequently adopted, coupled with an undertaking by the respondent to keep accounts shewing the extent of his transactions or manufactures and the names of the persons with whom he has dealt.[6]

Subsection (4).—*Caution.*

812. When interim interdict is granted to stay execution, the rules applicable to caution in suspensions apply, and the complainer will in the general case be ordered to find caution for the sum charged for and the expenses of the suspension and interdict. The Court, however, has full discretion and will not allow justice to be defeated by insisting on caution which the complainer may be unable to find. In the case of interim interdict to prevent infringement of rights the Court is more ready to exercise this discretion either by limiting the caution required or by dispensing with it altogether. Where the amount at stake is

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[1] *Lindsay* v. *Robertson*, 1867, 5 M. 864; *Baird* v. *Monkland Iron and Steel Co.*, 1862, 24 D. 1418; *Mercer* v. *Esk Valley Rly. Co.*, 1867, 5 M. 1024, per Lord Pres. Inglis at p. 1028.

[2] *Fife Ferry Trs.* v. *Mags. of Dysart*, 1827, 6 S. 265, per Lord Glenlee at p. 268; *Innes* v. *Partridge*, 1826, 4 S. 761; *Murray's Trs.* v. *Mowat*, 1835, 14 S. 84; *Innes* v. *Allardyce*, 1822, 2 S. 93 (N.E. 85); *Cronin* v. *Sutherland*, 1899, 2 F. 217; Rankine on Land-Ownership, p. 13.

[3] *Leechman* v. *Sievwright*, 1826, 4 S. 683 (N.E. 690); *Baillie* v. *M'Kay*, 1842, 4 D. 1520; *Duke of Argyll* v. *M'Arthur*, 1861, 23 D. 1236.

[4] *Johnston* v. *Dumfriesshire Road Trs.*, 1867, 5 M. 1127; cf. *Scott* v. *Clyde Navigation Trs.*, 1871, 8 S.L.R. 656; *Glasgow Mags.* v. *Glasgow Commrs. of Police*, 1839, 1 D. 460; *Caledonian Rly. Co.* v. *Buchanan*, 1855, 17 D. 996; *Earl of Fife* v. *Mags. of Banff*, 1829, 8 S. 137; *Ferguson* v. *Buchanan*, 1924 S.C. 42.

[5] *Johnston* v. *Dumfriesshire Road Trs., supra*; *Anderson* v. *Morris*, 1854, 26 Sc. Jur. 459; *Ferguson* v. *D. of Sutherland*, 1866, 2 S.L.R. 38; *Caledonian Rly. Co.* v. *Buchanan, supra*; *Carnegie* v. *Brand*, 1826, 4 S. 802; *Graham* v. *Duke of Hamilton*, 1868, 6 M. 965.

[6] *Stirling* v. *Black*, 11th March 1803, F.C.; *Macnee* v. *Black*, 1855, 17 D. 837; *Incandescent Gas Light Co., Ltd.* v. *M'Culloch*, 1897, 5 S.L.T. 180; *Ferguson* v. *D. of Sutherland, supra*; *Bernard* v. *Bernard*, 1893, 1 S.L.T. 29.

large and the order for caution would be beyond the power of the complainer this discretion will be exercised.[1]

Section 8.—Interdict in Sheriff Court.

813. An action of interdict alone is competent in the Sheriff Court in all cases to which the jurisdiction of the Court extends.[2] The application is made by initial writ in the usual form.[3] An interdict against a wrongous act done or threatened within the Sheriff's jurisdiction may competently be granted against a party not otherwise subject to the jurisdiction, on the same principle as in the Court of Session interdict may be granted against a foreigner.[4]

814. If interim interdict is sought it should be expressly prayed for, and the circumstances founded on should be set forth in the condescendence. It is competent to the Sheriff to grant or recal interim interdict at any stage of the proceedings, and interim interdict having been granted it will persist, unless recalled, pending appeal to the Sheriff or to the Court of Session until the cause is finally disposed of.[5] The Court of Session cannot recal interim interdict granted in the Sheriff Court except at the hearing of the appeal, but a motion before the Sheriff for recal at any time appears to be competent.[6]

Section 9.—Interdict in Burgh Courts.

815. There can be no doubt that the civil jurisdiction possessed by the magistrates in royal burghs and burghs of barony and regality includes the power to grant interdict regarding rights threatened with injury within the burgh. The Act of Sederunt of 13th February 1845, passed to regulate the forms of process to be used in civil actions in Burgh Courts, refers specifically to their right to grant interdict, including interim interdict. The civil jurisdiction of magistrates is now, however, seldom exercised. It was, besides, never exclusive, but only cumulative with that of the Sheriff, and, like the Sheriff's, it is subject to review by the Court of Session.[7]

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[1] *Balfour's Trs.* v. *Edinburgh Northern Rly. Co.*, 1848, 10 D. 1240, p. 1249; *Buchanan* v. *Dumbartonshire County Council*, 1924 S.C. 42; *Bruce* v. *Aberdeen Newspapers, Ltd.*, 31st May 1928 (unreported).

[2] Lewis, Sheriff Court Practice, p. 161.

[3] *Ibid.*, p. 45.

[4] *Ibid.*, p. 31.

[5] Sheriff Court (Scotland) Act, 1907, s. 29; Lewis, Sheriff Court Practice, pp. 214–219.

[6] Court of Session Act, 1868, s. 79; *Trainer* v. *Renfrew County Council*, 1907, 15 S.L.T. 201; see also *Macdonald* v. *Macleay*, 1928, S.N. 88; and *Macleay* v. *Macdonald*, 1928, S.N. 93.

[7] *Pattison* v. *Fitzgerald*, 1823, 2 S. 536; Heritable Jurisdictions (Scotland) Act, 1746 (20 Geo. II. c. 43), ss. 26, 27; Ersk. i. 4, 21, 22, 30.

INTERDICTION.

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Section 1.—Definition.

816. Erskine defines interdiction as "a legal restraint laid upon those who, either through their profuseness or the extreme facility of their tempers, are too easily induced to make hurtful conveyances, by which they are disabled from signing any deed to their prejudice without the consent of their curators, who are called interdictors." [1] The object of interdiction was to protect the property of any person of a weak and facile disposition (*prodigus*), which was otherwise liable to be squandered, to the detriment of himself and his heirs. Its imposition might be voluntary or judicial. But weakness of mind and facility required to exist in order to be a valid deed.[2] For no one of full capacity can while retaining the beneficial use of his property put it out of the reach of his creditors.[3] The interdictors might be appointed jointly or with a quorum or *sine quo non*.[4]

Section 2.—Voluntary Interdiction.

817. A person who was weak and facile might put himself under this restraint by granting a bond of interdiction in which, on the narrative that it was desirable that his property should be under the control of persons of firmer will and greater experience than himself, he bound himself to certain persons, his interdictors, that he would not grant any deed without their consent. The real cause of granting need not be inserted in the bond.[5] The Conveyancing (Scotland) Act, 1924,[6]

General Authorities.—Stair, i. 6, 37; iii. 8, 37; iv. 20, 30; Bankt. i. 7, 118; Ersk. i. 7, 53; Bell, Com. i. 139; Prin., s. 2123; Fraser on Parent and Child, 3rd ed., p. 692; Juridical Styles, 6th ed., ii. 932; 3rd ed., iii. 293.

[1] Ersk. i. 7, 53.

[2] *Wilkie*, 1666, Mor. 7160; *Hunter* v. *Hunter*, 1698, Mor. 7161; *Gordon* v. *Dick*, 1699, Mor. 7161.

[3] *White's Trs.* v. *Whyte*, 1877, 4 R. 786; *Reid* v. *Bell*, 1884, 12 R. 178.

[4] Bankt. i. 7, 132; *Hepburn* v. *Hepburn*, 1708, Mor. 7154.

[5] Ersk. i. 7, 53, see *Stewart* v. *Hay*, 1676, Mor. 7132; *Napier* v. *Houston*, 1706, 4 Br. Supp. 633; *Braimer* v. *Innes*, 1789, 3 Bell, Ill. 59.

[6] 14 & 15 Edw. V. c. 27, s. 44 (3) (*b*).

rendered interdiction, whether judicial or voluntary, incompetent from and after the commencement of the Act,[1] and provided that any interdiction which was legally operative at such commencement should remain equally operative for not longer than the period of five years thereafter. The subject is accordingly now of little more than historical interest.

Section 3.—Judicial Interdiction.

818. This could only be imposed by the Court of Session. It might proceed *ex proprio motu*, if it appeared to the Court, in the dependence of a suit, that one of the parties was facile and liable to be imposed upon; or it might be obtained by decree in an action at the instance of the person's heir or next of kin, or perhaps of any relative.[2] Proof had to be shewn by the pursuer of the action that the defender was weak and liable to be concussed into granting deeds to his prejudice.

Section 4.—Registration.

819. The interdiction was ineffectual (except against the interdictors)[3] until registration, the requisites of which were similar to those in the case of inhibition. Letters of publication were granted upon a bill presented to the Lord Ordinary on the Bills, their warrant being the registered bond of interdiction, or the decree of the Court. The letters in the case of judicial interdiction were executed against the *prodigus* in the same method as a summons, and in both cases they required to be registered in the Register of Inhibitions.[4]

Section 5.—Effect.

820. The restraint affects only deeds relating to the heritable property of the interdicted person, and transactions in regard to moveables in so far as, by diligence or otherwise, they are made the ground of proceeding against his heritage.[5] It has no retroactive effect.[6] Deeds granted without consent of the interdictors are not null, but reducible on proof of lesion. The person interdicted may grant rational and onerous deeds without consent, and these will be in every way as valid as if consent was given.[7] If the consent of the interdictors is adhibited to a deed—signing the deed as witnesses or cautioners will not do—it has the validity which it would have had if the granter had never

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[1] 1st January 1925.

[2] *Bryce* v. *Graham*, 25th January 1828, F.C.

[3] Ersk. i. 7, 56; *Grierson* v. *Telfer*, 1678, Mor. 7126 and 6298; *Tenants* v. *Spreul*, 1725, Mor. 7127; *Graham* v. *Stewart*, 1612, Mor. 7126.

[4] 31 and 32 Vict. c. 62, s. 16.

[5] Ersk. i. 7, 57; *Davidson* v. *Town of Edinburgh*, 1684, Mor. 7142; *Erskine* v. *Marjoribanks*, 1694, 4 Br. Supp. 231; *Arbuthnot* v. *Arbuthnot*, 1724, Mor. 7144.

[6] Ersk, i. 7, 54; *Scott*, 1837, 15 S. 924.

[7] *Stewart* v. *Hay*, 1676, Mor. 7132 and 3094; *Rae* v. *Maxwell*, 1711, Mor. 7150; *A.* v. *B.*, 1672, Mor. 7149.

been interdicted. If lesion is suffered, the interdicted person has only recourse against his interdictors in a claim of damages, on the ground that their consent was wrongously or fraudulently given. A deed granted by a *prodigus* after interdiction in favour of one of his interdictors has been upheld. Such a deed is to be treated as if no consent was adhibited, and therefore the test of its efficacy is—Is it rational and onerous? [1]

821. In regard to *mortis causa* deeds Erskine says [2] that an interdicted person "can make no settlement of his heritable estate, nor alter any former settlement of it, though upon the most rational grounds, either with or without his interdictors' consent"; but the opinions of the other text writers are opposed to this, and the decision in a reported case was expressly laid upon the ground that interdiction effects no limitation upon the power to test.[3] Reduction *ex capite interdictionis* may be sued in an action at the instance of the *prodigus*,[4] or his heir or other near relative,[5] or by the interdictors or a creditor.[6] The general rule is that a plea of invalidity of a deed on this ground can only be put forward in an action brought for that purpose; but it would seem that this rule is not without exception, and that in some cases, at any rate, it may be pleaded *ope exceptionis*.[7]

Section 6.—Recal.

822. Recal of interdiction, when it has been imposed voluntarily, cannot be made at the will of the interdicted person, because "the law, presuming that he would not have laid himself under that restraint if he had not been conscious of his incapacity for business, considers his interest against his inclination." [8] It falls with the death of the interdictors or of a *sine quo non*, or with the reduction of their number below a quorum, if that is required by the bond. It may be removed by the Court of Session, in an action at the instance of the *prodigus*, on proof that there was no sufficient reason for the restraint at the beginning, or that the interdicted person has become *rei suæ providus*: [9] and it may be recalled by the common consent of interdictors and interdicted. But a bond of interdiction by an unmarried woman, which was subsequently ratified and approved in her marriage contract, was held to be irrevocable.[10] The Court of Session alone can bring judicial interdiction to an end, since it must be removed by the authority

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[1] *Kyle* v. *Kyle*, 1826, 5 S. 117; *Fraser* v. *Fraser*, 1827, 5 S. 279; *Rankin* v. *Russell*, 1868, 7 M. 126.
[2] Ersk. i. 7, 58.
[3] *Mansfield* v. *Stuart*, 1841, 3 D. 1103.
[4] *Graham* v. *Stuart*, 1612, Mor. 7126.
[5] *Tenants* v. *Spreul*, 1725, Mor. 7165; *Borthwick* v. *Galashiells*, 1635, 1 Br. Supp. 90.
[6] *Salton* v. *Park*, 1666, Mor. 10420.
[7] *Rankin* v. *Russell*, 1868, 7 M. 126.
[8] Ersk. i. 7, 55.
[9] See *C. G.* v. *N. M.* (O.H.), 1901, 9 S.L.T. 243.
[10] *Williamson* v. *Boothby*, 1890, 17 R. 927.

by which it was imposed. If the interdictors had died, application to the Court of Session was necessary to have others appointed.

Section 7.—Duties of Interdictor.

823. The office of an interdictor differs materially from that of tutor or curator. He has no guardianship or care of the person or property of the *prodigus :* he is appointed solely *ad auctoritatem præstandam.* He may consent to the granting of a deed by the person interdicted, or he may refuse to do so. If his consent is given, he is answerable for fraud or fault in giving it. But he is not liable for omissions; if he refuses to give consent, the interdicted person, it has been said, may apply to the Court to have their authority interponed to the deed.[1] The more suitable procedure would probably be to petition the Court to remove the interdictors and to appoint others, but in view of the provision of the Conveyancing (Scotland) Act, 1924, above referred to this would appear now to be incompetent.

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[1] *E. of Athole,* 1607, Mor. 7147.

INTEREST (OF MONEY).

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Section 1.—Simple Interest.

Subsection (1).—*On what Debts due.*

824. "Nothing can be considered less amenable to a settled general principle than our law upon a creditor's right to interest. Interest upon bills and notes is settled by statute; [1] that on bonds by express contract; [2] that on loans by legal implication.[3] But when this has been said, almost all that has been fixed is presented. We must bear in mind that every liquid debt past due does not bear interest. Feu-duties,[4] ground-annuals, and rents [5] are cases in point where payment of interest has not been made matter of express obligation. But what of other debts, mercantile accounts, law agent's business accounts, accounts for services of any description? The most that can be said is that where there is anything in the course of dealing or in the custom of trade which suggests that, if the debt should not be paid at a particular period, interest will run, that will be allowed, otherwise not. A demand for payment more or less urgent seems to me, apart from contract, to be a condition precedent to liability for interest. Common sense itself suggests that a man who pays whenever payment is asked pays in good time." [6]

825. Lord Fraser in the same case [7] said: "Claims for interest cannot be brought under any general rule. They are said to arise *ex lege*, or *ex pacto*, or *ex mora*. With regard to interest due *ex pacto* the case is quite clear. It is lawful to stipulate for interest, and now that the usury laws are abolished any amount of interest may be agreed upon and exacted. It is when the claim is founded, not on paction, but on some rule of law, that the difficulty arises. Interest is due *ex lege* in various cases by statute; and it is in virtue of statutory

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[1] 45 & 46 Vict. c. 61, ss. 9, 57.
[2] But the agreement must be express (*Forbes* v. *Welsh & Forbes*, 1894, 21 R. 630).
[3] *Garthland's Trs.* v. *M'Dowall*, 26th May 1820, F.C.
[4] *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958.
[5] *Advocate-General* v. *Sinclair's Trs.*, 1855, 17 D. 290.
[6] *Blair's Trs.* v. *Payne*, 1884, 12 R. 104, per Lord Craighill at p. 108.
[7] *Blair's Trs.*, *supra*, at p. 109.

enactment that it is claimable in Scotland upon bills of exchange and promissory notes,[1] and there are other instances in which the claim has statutory sanction. Interest is also due by law upon money lent; and it was so found although there was no stipulation for interest,[2] and the demand for it was only made thirty-four years after the loan, and when the lender and borrower were both dead.[3] But it is not correct to say that interest is claimable upon all debts, either from the date when the account was closed or from the date that it was rendered. It is sometimes said that interest is due as damages for the undue detention of money when a debt clearly ascertained remains unpaid. By those lawyers who hold this opinion interest is considered incident legally to every debt certain in amount and payable at a certain time. This is plainly not good law. There are many illustrations to the contrary. No debt can be more certain in amount or certain as to the time of payment than feu-duties or ground-annuals, and yet it has been determined frequently that interest is not due upon arrears of these.[4] According to the principle of these decisions, interest would not be claimable upon rents unless expressly stipulated for; and for this latter proposition (which has not been expressly decided) there are judicial *dicta* of high authority.[5] The ground of these decisions simply was, that parties having stipulated for the payment of a specific sum without stipulating for interest on non-payment, it was not intended that interest in such circumstances should be claimed. The cases of bills and loans of money, in regard to which interest is due though not stipulated for, rest on special grounds. Interest is due on bills by virtue of statute.[6] And the law implies an obligation to pay interest on loans arising from the very nature of the contract. The mere fact, therefore, of delay in payment after payment could have been, or has been, demanded, will not necessarily ground a claim for interest, and consequently there must be distinctions made, consequent upon the nature of the debt due and upon the reasons of the non-payment of it. Lord Westbury, in the case of *Carmichael*,[7] expresses himself as follows: 'Interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid.' According to this opinion the mere non-payment of money was not sufficient. It must be 'wrongfully' withheld."

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[1] From the date of presentment or maturity (1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72; 45 & 46 Vict. c. 61, ss. 9 and 57).

[2] *Garthland's Trs., supra.*

[3] *Cuninghame* v. *Boswell*, 1868, 6 M. 890.

[4] *Napier* v. *Spiers' Trs.*, 1831, 9 S. 655; *Wallace* v. *Eglinton*, 1835, 13 S. 564; *Wallace* v. *Crawfurd's Exrs.*, 1838, 1 D. 162; *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958.

[5] *Advocate-General* v. *Sinclair's Trs.*, 1855, 17 D. 290.

[6] From the date of presentment when the bill is payable on demand, otherwise from maturity (45 & 46 Vict. c. 61, ss. 9, 57).

[7] *Carmichael* v. *Caledonian Rly. Co.*, 1870, 8 M. (H.L.) 131.

826. This *dictum* of Lord Westbury was cited also with approval by Lord Young in *Durie's Trs.* v. *Ayton*;[1] and to the same effect Lord Brougham in the *Edinburgh and Glasgow Union Canal Co.* v. *Carmichael*[2] said: "Unless there was a contract to pay the money on a given day, which had passed by without payment, no claim for interest could have been competent"; and Lord Campbell: "The contract contains no express stipulation for interest. The burden is on the person claiming to shew that interest is due." So money was found not to be wrongfully withheld during the period between the date of a Lord Ordinary's decree awarding damages and a final judgment of the House of Lords, and no interest was awarded prior to the date of the decree of the Court of Session applying the judgment of the House of Lords.[3]

827. *Blair's* case[4] is the only authority in which the decisions in earlier cases have been reviewed and examined from the bench and the law on the subject considered from the point of view of principle. Of the other cases, putting aside those which turned on the construction of statutes or contracts,[5] the bulk of the decisions appear to have been based upon the doctrine that "whoever has intromitted with money belonging to another, or has unjustly detained it, is, in general, liable for interest, at least from the time that a legal demand has been made for it. This is not so much from any real or supposed *mora*, but rather as a recompense to the creditor for being deprived of the use of his money."[6] Advances of money accordingly carry interest, including arrears of sums advanced towards aliment[7] and cash advances by a law agent;[8] but "cash advances" do not include ordinary judicial outlays.[9]

Subsection (2).—*From what Date due.*

828. On legacies, interest runs from the date of the testator's death or six months thereafter,[10] as also on claims of legitim.[11] On the other hand, the executry is entitled to compute interest on advances towards legitim made during the parent's life.[12] In awarding interest on such claims a distinction appears to have been drawn between cases where

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[1] 1894, 22 R. 34, at p. 38.
[2] 1842, 1 Bell's App. 316.
[3] *Roger* v. *J. & P. Cochrane & Co.*, 1910 S.C. 1.
[4] *Blair's Trs.* v. *Payne*, 1884, 12 R. 104.
[5] E.g. *Wauchope* v. *North British Rly. Co.*, 1863, 2 M. 326; *Christie* v. *Matheson*, 1879, 10 M. 9; *Ewing & Co.* v. *Ewing*, 1882, 10 R. (H.L.) 1.
[6] See Ersk., iii. 3, 80; *Anderson, Petr.*, 1805, 13 F.C. 437, argument; *Darling* v. *Adamson*, 1834, 12 S. 598; see also *M'Intyre, Petr.*, 1904 (O.H.), 12 S.L.T. 444—cash balance due by factor.
[7] *Hill* v. *Gilroy*, 1821, 1 S. 33.
[8] *Findlay, Bannatyne & Co.'s Assignee* v. *Donaldson*, 1864, 2 M. (H.L.) 86; *Graham's Exrs.* v. *Fletcher's Exrs.*, 9 M. 298; *Blair's Trs., supra.*
[9] *Macpherson* v. *Tytler*, 1853, 15 D. 706; *Barclay* v. *Barclay*, 1850, 22 Sc. Jur. 354.
[10] *Kirkpatrick* v. *Bedford*, 1878, 6 R. (H.L.) 4; *M'Lean's Trs.* v. *M'Lean*, 1891, 18 R. 892.
[11] *M'Murray* v. *M'Murray's Trs.*, 1852, 14 D. 1048; *Bishop's Trs.* v. *Bishop*, 1894, 21 R. 728; *Gilchrist* v. *Gilchrist's Trs.*, 1889, 16 R. 1118.
[12] *Johnston* v. *Cochran*, 1829, 7 S. 226.

the trustee was *in mora* in making payment and cases where there was a real difficulty in realising trust funds.

829. Where one enters into possession of land on a contract of sale but does not pay the price, he is liable for interest on the price from the date of entry as an equivalent for the fruits of the soil.[1] But where a railway company occupied a line in terms of statutory authority with the corresponding duty of paying a rent to be fixed by an arbiter, and the occupation continued for some years before the rent was fixed, they were held not liable for interest on sums due for their occupation between the date of their entry and the assessment of the rent.[2]

830. As pointed out by Lord Fraser in *Blair's* case,[3] it is doubtful whether a tradesman can demand interest upon an account rendered, apart from special bargain. In the case of *Cardno*[4] the defender conceded that a tradesman should receive interest from the date of his last rendering his account; but the Court hesitated to consider the point. A similar doubt was expressed in *Blair's* case, but it is thought that the law stands thus. Interest on such debts is undoubtedly due from the date of judicial or notarial demand from a point of time agreed on by the debtor and creditor for the payment of the debt,[5] or from the expiry of the credit allowed by the custom of the particular trade; and on illiquid claims, from the date of a decree establishing the debt.[6] Interest has been allowed on a law agent's account for professional services from one year after the date of the last entry in his account,[7] unless there has been undue delay in rendering the bill.[8]

Section 2.—Compound Interest.

831. Compound interest is only allowed as a penalty for breach of trust duties, or where the holder of a fund is under an obligation to accumulate interest. To this rule there is, of course, the exception of special agreement, and noticeably the terms upon which banks lend money. This rule is recognised as firmly established in the decision in the case of *Douglas*,[9] where Lord Justice-Clerk Inglis stated it thus: "A claim for compound interest with annual rests is a demand which can only be maintained either in the case of a fixed usage in commercial dealings or where there has been an abuse in the party trusted with funds and violating his trust. In dealing with money in a bank, interest is accumu-

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[1] *Spiers* v. *Ardrossan Canal Co.*, 1827, 5 S. 764; *Wallace* v. *Oswald*, 1825, 3 S. 525; *Dickson* v. *Munro*, 1855, 17 D. 524; *West Highland Rly. Co.* v. *Place*, 1894, 21 R. 576; *Grandison's Trs.* v. *Jardine*, 1895, 22 R. 925.

[2] *Stirlingshire and Dunfermline Rly. Co.* v. *Edinburgh and Glasgow Rly. Co.*, 1857, 19 D. 598.

[3] *Blair's Trs.* v. *Payne*, 1884, 12 R. 104.

[4] *Cardno and Darling* v. *Steuart*, 1869, 7 M. 1026.

[5] *Linlithgow Oil Co.* v. *North British Rly. Co.*, 1904 (O.H.), 12 S.L.T. 421.

[6] *Wallace* v. *Geddes*, 1821, 1 Sh. App. 42.

[7] *Young* v. *Baillie*, 1830, 8 S. 624; *Walls*, 1865, 3 M. 536.

[8] *Bremner* v. *Mabon*, 1837, 16 S. 213; *Napier* v. *Balfour*, 1835, 13 S. 853; see Bell, Com., i. 691 *et seq.*

[9] *Douglas* v. *Douglas's Trs.*, 1867, 5 M. 827.

lated because the course of practice in reference to banks dealing in money is fixed.[1] Where there is a fiduciary relation constituted between two parties, so that the party who is trustee is bound either to recover or account for sums of money and fails in his duty and, it may be, uses for his own purposes the property held by him in trust, he shall be held to account upon the very strictest system of accounting. I think that the decision in the case of *Jolly* v. *M'Neill*,[2] which has been adopted and adhered to since, effectually put a stop to the principle of accumulation as being acted upon in our law in the case of ordinary debtor and creditor. There could not be a case more fitted for the equitable interposition of the Court in dealing with a debtor on stringent principles, if it was considered consistent with law to do so, than the case of *Jolly*. There was delay for a very long period, and that delay was occasioned by the passing off of an alleged discharge which was found to be wholly bad, even positively fraudulent, in the end; and yet, the Court here having given accumulated interest with biennial rests, the House of Lords reversed that judgment under the direction of Lord Lyndhurst. In the subsequent case of *Napier* v. *Gordon* [3] there is no impeachment of the doctrine laid down in *Jolly's* case; and in the case of *Maclean* v. *Campbell* [4] the doctrine is affirmed that accumulation is a penal demand only to be given effect to in circumstances which justify it, except in the case of persons having a fiduciary character, or in commercial dealings." So a *curator bonis* who had retained his ward's funds in his own hands was held liable in compound interest at 5 per cent. on annual balances.[5]

Section 3.—Rate of Interest.

832. The rate of interest awarded by the Courts in recent years has varied from 2 per cent. to 5 per cent., according to the circumstances of the case viewed in the light of the Court's discretion. "There is at present no statutory rate of legal interest; 5 per cent. was only a maximum rate, and there is no statutory rule obliging the Court to award 5 per cent. in perpetuity. It may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country." [6] Accordingly, in that case, which was an accounting between an executrix and a son for legitim, the Court awarded 4 per cent., the interest actually earned. In *Bishop's Trs.* v. *Bishop*,[7] which was of the same nature, 5 per cent. was allowed; while in *Melville* v. *Noble's Trs.*[8] 3 per cent. was considered a fair rate of interest on trust funds. See also Moneylenders.

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[1] Cp. *Findlay, Bannatyne & Co.'s Assignee* v. *Donaldson*, 1864, 2 M. (H.L.) 86.
[2] 1830, 4 W. & S. 455. [3] 1831, 5 W. & S. 745. [4] 1856, 18 D. 609.
[5] *Blair* v. *Murray*, 1843, 5 D. 1315; *Buchanan* v. *Mackersy*, 1847, 9 D. 700. See also *Campbell* v. *E. of Galloway*, 9th Mar. 1802, F.C.; *Hamilton* v. *Marshall*, 25th Feb. 1813, F.C.; *Hall* v. *Jerdon*, 23rd Nov. 1813, F.C.
[6] Per Lord M'Laren in *Ross* v. *Ross*, 1896, 23 R. 802.
[7] 1894, 21 R. 728. [8] 1896, 24 R. 243.

INTEREST.

See ACTION; ARBITRATION.

INTERIM DECREE.

See DECREE.

INTERIM EXECUTION.

See APPEAL.

INTERIM POSSESSION.

See INTERDICT.

INTERLINEATIONS.

See DEEDS (EXECUTION OF).

INTERLOCUTOR.

See DECREE.

INTERNATIONAL LAW.

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Section 1.—Definition and Scope.

833. International Law or the Law of Nations may be defined as the body of rules which regulates the conduct of the independent States in the family of nations in their intercourse with one another, in peace and in war, and which is binding as law because it is based upon the common consent, express or implied, of those States. It is a body of doctrine which civilised States have generally believed to be binding upon them with a force and authority comparable to that which in their own systems is conceded to their own law. The law of nations is but private law "writ large."[1] It is an application to political communities of those legal ideas which were originally applied to the relations of

General Authorities.—Brierly, The Law of Nations: an Introduction to the International Law of Peace (1928); Butler and Maccoby, The Development of International Law (1928); Hall, Treatise on International Law, 8th ed. (1924); Oppenheim, International Law, 4th ed. (1926–1928); Hyde, International Law chiefly as Interpreted and Applied by the United States (1922); Wheaton, International Law, 6th ed. (1929), edited by Arthur Berriedale Keith. A list of British and foreign treatises, of collections of treaties, of bibliographies, and of periodicals will be found in Oppenheim's International Law, 4th ed., i. 114–129. Moore, Digest of International Law, Washington Government Printing Office (1906); Fauchille, Traité de droit international public, Paris, 1921–1926; Sir Frederick Pollock, The League of Nations (1922); A. P. Fachiri, The Permanent Court of International Justice (1925); The British Year Book of International Law, 1920 *et seq.*; the publications of the Royal (British) Institute of International Affairs, which include: The History of the Peace Conference of Paris of 1919, and A Survey of International Affairs thereafter; Pitt Cobbett, Leading Cases on International Law: Vol. i. Peace (1922); vol. ii. War and Neutrality (1924).

[1] Holland, Studies in International Law, p. 152.

individuals, and the main difference between municipal or national law and international law is a difference in the stage of development.

834. Whereas the Law of Nations regulates all the relations into which States may come, both peaceful and hostile, the Conflict of Laws or international private law regulates the relations between persons or things in one country and persons or things in another country, and is a branch of the law of Scotland. International law, on the other hand, is a law of States exclusively, and it does not recognise individuals directly, although it may appear to do so. The term "State," however, must be taken with a certain latitude of meaning. A very considerable measure of international personality, for example, must be conceded to the self-governing Dominions of the British Commonwealth of Nations.[1] But since the Act of Union of 1707 [2] "the North part of Great Britain called Scotland," although possessing strongly marked national characteristics, has ceased to be an international person.

835. The ultimate problem of international jurisprudence has been stated to be: How to find international equivalents for the factors known to national law as legislation, jurisdiction and executive.[3] International law can never become a real law unless and until there is formed a concourse of nations able to agree upon that which shall be law, resolved to enforce it upon recalcitrant members, and armed by mutual agreement with the material force necessary to restrain and coerce those members of the international family who disobey its decrees. The most familiar and elementary weakness of international law has always been that it has formally recognised in war a permitted system of international litigation.[4] The Treaties of Peace which followed the war of 1914–1919 have by the creation of the League of Nations, and subsequently of the Permanent Court of International Justice, made changes in international law of vast importance which cannot, however, as yet be said to have passed beyond the experimental stages. The members of the international society, both during and since the late war, have been made to feel with increasing severity their mutual interdependence, and the closer the contact the greater the need for the regulation of their intercourse by settled rules.

Section 2.—The Relation between International Law and Municipal or National Law.

836. International law and municipal law differ essentially (*a*) as regards their sources, (*b*) as regards the relations they regulate, and (*c*) as regards their substance. The sources of international law will be discussed in the paragraph which follows. Stated generally, there are but two, namely, (1) custom which has grown up within the family of nations, and

[1] Imperial Conference, 1926, Summary of Proceedings. Cmd. 2768.
[2] 6 Anne, c. 11.
[3] Lorimer, Institutes of the Law of Nations, ii. 186.
[4] Lord Birkenhead's Address on International Law before the Canadian Bar Association, 3rd September 1923.

(2) law-making treaties concluded by members of the family. Whereas municipal law regulates the relations between individuals in a State and the relations between the State and those individuals, the law of nations regulates the relations between the member States of the family. It is a law not above but between "Sovereign" States, and is therefore a weaker law.[1] "There is no such thing as a standard of international law extraneous to the domestic law of a kingdom to which appeal may be made. International law so far as the Scottish Courts are concerned is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland." [2]

837. A British Court regards itself as bound to give effect to a rule of international law only if it can be shewn by the clearest evidence that the rule is assented to by this country. The requisite evidence is forthcoming if (*a*) the rule is embodied in an International Convention which has been ratified by this country, provided the Convention does not conflict with the statute law of this country, or (*b*) the rule has been adopted into the civil law, the ordinary law of the land. Such adoption takes place when the legislature passes an Act based upon a rule of international law—for example, the Air Navigation Act of 1920, which was passed to enable effect to be given to the International Convention for the Regulation of Aerial Navigation, concluded at Paris in the previous year; or when a Court creates a precedent by giving a decision in conformity with a rule of international law. But when international law binds a British Court because of its incorporation into municipal or civil law, it binds not as international law but as civil law—for example, the Diplomatic Privileges Act of 1708,[3] which is based on the rules of international law as to diplomatic immunities; or the Territorial Waters Jurisdiction Act, 1878,[4] which recognises the international principle that the sea off a State's coast is territorial for three marine miles measured from low-water mark.

838. A British Court will always try to construe municipal law in such a way as not to conflict with well-established principles of international law, even although these rules are not incorporated in the law of the land. But if an Act of Parliament is in flagrant violation of international law, a British Court cannot refuse on that ground to apply the Act.[5]

839. Cases which directly involve questions between State and State rarely, if ever, come before an ordinary civil Court; but while this is so, numerous cases are raised in the British Courts which indirectly raise international issues, and which therefore involve international law. For example, the owners of a tug may sue a foreign public ship in a British port for salvage services, or a tradesman may sue a foreign

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[1] Oppenheim, International Law, 4th ed., i. 29, 30.

[2] Lord Dunedin in *Mortensen* v. *Peters* (full bench), 1906, 5 Adam, 121; 8 F. (J.) 93, at p. 101.

[3] 7 Anne, c. 12.

[4] 41 & 42 Vict. c. 73.

[5] *Mortensen* v. *Peters*, 1906, 5 Adam, 121: 8 F. (J.) 93.

ambassador for the price of goods supplied. Such cases in their direct aspect are simply cases of civil law, but they also involve international law, for international law declares that a foreign man-of-war and a foreign ambassador are exempt from the jurisdiction.

840. In addition to the presumption against conflicts between international law and municipal law, there is a presumption of the existence of certain municipal rules which are in conformity with the rights granted by the law of nations.[1]

Section 3.—The Sources of International Law.

841. The two exclusive sources of international law are custom and law-making treaties. Custom must not be confounded with mere frequency or habit of conduct. It signifies rather that line of conduct which the family of nations has consented to regard as obligatory. Custom is the older source. The device of utilising international gatherings as a means of getting States to agree to rules of conduct has only been in operation for a little over a century. Attempts at international legislation were first made at one or two Congresses which were held for the purpose primarily of settling the terms of peace after war. Later, Conferences were summoned from time to time, notably The Hague Peace Conferences of 1899 and 1907, unconnected with any war, for the express and exclusive purpose of laying down rules of conduct. The number of law-making treaties is increasing so rapidly that the conventional law of nations is taking its place beside the older customary law, and perhaps already surpasses it in importance.

842. Writers on international law frequently enumerate other sources besides custom and treaties. "When they do so," writes Oppenheim,[2] "they confound the term 'source' with that of 'cause' by calling sources of international law such factors as influence the gradual growth of new rules of international law without, however, being the historical facts from which these rules receive their legal force." Oppenheim proceeds to enumerate as important factors of this kind: (1) Opinions of famous writers on international law, (2) decisions of prize Courts, (3) arbitral awards, (4) instructions issued by States for the guidance of their diplomatic and other organs, (5) State papers concerning foreign politics, (6) certain municipal laws, and (7) decisions of municipal Courts. In his opinion as a law officer of the Crown on the question of Frederick the Great's sequestration of the Silesian Loan, Lord Mansfield refers to the law of nations as founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage.

843. The science of international law owes its foundation to text-writers, and notably to the Dutch jurist Hugo Grotius (1583–1645), who published in 1625 a treatise on the Law of War and Peace; but no text-writer, however eminent, can create international law. In the

[1] Oppenheim, International Law, 4th ed., i. 34. [2] *Ibid.*, 27.

case of *The "Paquete Habana,"* [1] Mr Justice Grey, in delivering the judgment of the Supreme Court of the United States of America, described the function of the text-writer in the following terms: "International law must be ascertained and administered by the Courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations; and as evidence of these, to the works of jurists and commentators who, by years of labour, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

844. The growth of international law is also influenced by what is known as the Comity of Nations, or those rules of politeness, convenience, and goodwill which, although not legally binding on States, are generally observed by them. Many a rule which began as a rule of comity has in course of time become a rule of international law.

Section 4.—Decisions of Prize Courts.

845. A Prize Court is a tribunal which comes into active operation in time of war. By international law a belligerent State with a navy may exercise the right of maritime capture. It may seize not only enemy ships and cargoes, but also neutral merchant ships and cargoes suspected of impeding its warlike operations. International law requires that there should always be a judicial inquiry into any capture made at sea by the State whose ship has made the capture, to see that all is in order. The law of every maritime State provides for this work being undertaken by a special Court whenever the State finds itself at war. In Great Britain the Admiralty Division of the High Court of Justice is commissioned to act as a Prize Court in time of war, and the Judicial Committee of the Privy Council is the final Court of Appeal in prize cases. Scotland has no longer a separate prize jurisdiction. The duty of a Prize Court, according to Lord Stowell, is "to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some to be belligerent." A Prize Court is bound by a national statute even though it be inconsistent with international law, but in this country it is not bound by instructions in the form of Orders in Council as distinct from Acts of Parliament if these Orders are inconsistent with international law.[2] While the decisions of Prize Courts cannot make international law, they can originate

[1] 1899, American Prize Cases, p. 1938.

[2] *The "Zamora,"* [1916] 2 A.C. 77.

doctrines which may become law if generally accepted and acted on by other maritime States.[1]

Section 5.—The Jurisdiction of States within their Territories.

Subsection (1).—*Jurisdiction in Territorial Waters.*

846. The marginal belt or the maritime domain forms part of the territory of a State as fully as does its land domain. The air domain of a State includes the air superincumbent over the territorial waters as well as over the land.

847. Cornelius van Bynkershoek (1673–1743), a Dutch judge, published in 1702 a treatise, *De Dominio Maris*, in which he states as a rule of law, "*Imperium terræ finitur ubi finitur armorum potestas.*" At that time cannon range (*armorum potestas*) was about three miles, and although the ratio of the rule has long since disappeared with the greatly increased range of artillery, Great Britain still regards her territorial jurisdiction as extending out to sea only for a distance of three marine miles measured from the low-water mark. In the Liquor Treaty concluded between the British Empire and the United States of America on 23rd January and ratified on 22nd May 1924, the High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters. This Treaty, however, enables the United States to "visit and search" British vessels within a certain distance beyond the three-mile limit if they are suspected of violating the American prohibition law known as the Volstead Act. But neither the extent nor the legal status of territorial waters can be regarded internationally as definitely settled. Some States, for example Norway, have repeatedly made claim to water-belts based on the peculiar configuration of the coastline.

848. When a fishery exists in the territorial waters of a State its exclusive use belongs to the subjects of that State. So far as Scotland is concerned, this matter was the subject of inquiry by a Departmental Committee on Trawling and Policing of Scottish Sea Fisheries, whose Report was published in 1924 by H.M. Stationery Office.

849. The ownership of the bed of the sea within the three-mile limit is a survival of more extensive claims to ownership and sovereignty over the bed of the sea.

850. It has been pointed out in a recent case,[2] that the question of what bays, gulfs, firths, or estuaries should be held to be within the territory of the State which owns the land on both sides has never been authoritatively answered, except in cases where some effective occupation

[1] Roscoe, The History of the English Prize Court (1924); Colombos, The Law of Prize (1926); Garner, Prize Law during the World War (1927); Digest of Cases, British Prize Courts (1914–1927), H.M. Stationery Office (1927). [2] *The "Fagernes,"* [1927] P. 311.

has been proved or some statutory recognition established, or where the opening was so narrow as to admit of no doubt. Atkin L.J. based his decision on the ground that "what is territory of the Crown is a matter of which the Court takes judicial notice. The Court has therefore to inform itself from the best material available, and on such a matter it may be its duty to obtain its information from the appropriate Department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive." In the seventeenth century Lord Hale maintained that "that arm or branch of the sea which lies within the *fauces terræ* where a man may reasonably discerne between shore and shore is, or at least may be, within the body of a County." In many Fishery Conventions—for example the North Sea Fisheries Convention, 1882—a width of ten miles has been taken as the test even although the waters spread out fanwise on the landward side of the ten-mile line. The waters are territorial for three marine miles out to sea, measured from the ten-mile line. This is probably the rule which should be applied to the Firths of Scotland and to those lochs which are arms of the sea. With regard to straits like the Minch there is little authority, and it is uncertain whether the principle of the marginal belt or some principle analogous to that relating to bays should be applied. The following passage in the Arbitral Award in the case of *The North Atlantic Coast Fisheries* between Great Britain and the United States of America, dated 7th September 1910 (Hague Court Reports, p. 141), is perhaps as exact a statement of the relevant considerations as can be made: "The interpretation must take into account all the individual circumstances . . . the relation of width to length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general."

851. Foreign ships have a right of innocent passage through the territorial waters.

852. The Territorial Waters Jurisdiction Act of 1878[1] regulates "the law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's dominions." A foreigner is to be prosecuted only by leave of a Secretary of State.

Subsection (2).—*Ships on the High Seas.*

853. Every State has jurisdiction over ships flying its flag on the high seas, and it may apply its law, civil and criminal, to all aboard irrespective of their nationality. In the case of *The "Lotus,"*[2] Lord Finlay stated the law to be as follows: "A ship is a moveable chattel,

[1] 41 & 42 Vict. c. 73.

[2] (1927), Collection of Judgments of the Permanent Court of International Justice, No. 10.

it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. It appears to me to be impossible with any reason to apply the principle of locality to the case of ships coming into collision for the purpose of ascertaining what Court has jurisdiction. That depends on the principles of maritime law. Criminal jurisdiction for negligence causing a collision is in the Courts of the country of the flag, provided that, if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the Courts of his own country." In *The "Lotus"* case, however, the International Court of Justice by a majority held that there was no rule of international law which forbade the Turkish Criminal Courts to assume jurisdiction in the following circumstances. *The "Lotus,"* a French mail steamer, when on a voyage to Constantinople, came into collision in the Ægean Sea, outside the territorial waters of Turkey, with the Turkish collier *"Boz-Kourt." The "Boz-Kourt"* sank with loss of life. On her arrival at Constantinople the officer in charge of *The "Lotus"* at the time of the collision was arrested, tried, and convicted of manslaughter. The majority of the International Court upheld the jurisdiction of the Turkish Courts on the ground that the effects of the offence had been produced on the Turkish vessel, although the actor himself was on board the French vessel. This decision has no binding force, however, as a precedent.

Subsection (3).—*Foreign Ships in Port.*

854. A distinction was formerly drawn between public and private ships, but since the Brussels Conference of 1926 vessels which are owned or operated by States, and their cargoes and passengers, are to be subject to the same liability in respect of claims as those privately owned. This does not apply, however, to ships of war and State-owned non-trading vessels. A foreign private ship is fully subject to the local jurisdiction in civil and in criminal matters, but as a matter of comity this right may be waived, so far at least as criminal jurisdiction is concerned, in favour of the Courts of the national's country. Public ships are wholly exempt from the local jurisdiction, but they are under a duty to obey the law of the port. Even in the case of offences committed by members of the crew on shore which disturb the peace of the port, it is usual for the port authorities to hand over the offenders to the ship's officers. In the event of failure to obey the law of the port recourse can only be had to diplomatic action.

Subsection (4).—*Pursuit into non-Territorial Waters.*

855. The law with regard to the pursuit of a vessel into non-territorial waters for infractions of law committed in territorial waters is stated as

follows by the late Mr. W. E. Hall:[1] "When a vessel or someone on board her, while within foreign territory, commits an infraction of its laws she may be pursued into the open seas and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which, but for the accident of immediate escape, would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful."

SUBSECTION (5).—*Diplomatic Persons and Heads of States.*

856. The immunities of diplomatic agents rest partly on the common law and partly on the Diplomatic Privileges Act of 1708.[2] This Act is merely declaratory of the common law. It proceeds on the preamble that "Whereas several turbulent and disorderly persons having in a most outragious manner insulted the person of his Excellency . . . Ambassador Extraordinary of His Czarish Majesty Emperor of Great Russia Her Majesties Good Friend and Ally by arresting him and taking him by violence out of his coach in the publick street in contempt of the protection granted by Her Majesty, contrary to the law of nations and in prejudice of the rights and privileges which Ambassadors and other Publick Ministers . . . have at all times been possessed of and ought to be kept sacred and inviolable . . . and to prevent the like insolences for the future." There are certain immunities connected with the person, notably the immunities of the Minister and those of his suite who possess the diplomatic character, and the immunities of his wife and children, those of his suite who do not possess the diplomatic character, and his servants, and there are certain other immunities connected with property: immunities of the hotel or residence and other property belonging to the embassy; immunities of the private property of the Minister in the country to which he is accredited; and immunities of goods sent from abroad for the use of the embassy. A diplomatic person is wholly exempt from criminal proceedings and from police action. He is also exempt from civil proceedings, and he may not be required to give evidence.

857. In general, the modern practice in this country is to treat his immunity as complete unless he voluntarily submits to the jurisdiction. Writs against him or his property are null and void, and any person

[1] Hall's International Law, 8th ed. (1924), p. 309.

[2] 7 Anne, c. 12.

"presuming to sue forth such a writ and all officers executing it shall be deemed violators of the law of nations and disturbers of the publick repose, and shall suffer such pains and penalties and corporal punishment as the Lord Chancellor and the Lord Chief Justices shall judge fit." If, however, a diplomatic person has submitted to the jurisdiction, there is no doubt that the Courts may assume it. But there may be difficulty in enforcing the orders of the Court by the ordinary forms of process. The immunities extend to the family and the suite, a list of whose names should be furnished to the Foreign Office. The Minister's motor-car and chauffeur are alike protected from proceedings. Domestic servants are expressly protected from civil proceedings unless they engage in trade, but they are probably not exempt from the criminal jurisdiction.

858. A diplomatic agent has a certain immunity from taxation, the extent of which varies under different systems of taxation.

859. The heads of foreign States, including the ruling princes of India, are exempt from the jurisdiction of the State which they are visiting. The proper evidence is a certificate by the Secretary of State of the Foreign, Colonial, or Dominions Office.[1]

860. Consuls do not possess the status of diplomatic agents. They perform various services for the State or its subjects in another State, and they are generally subject to the authority of the diplomatic representative of the State for which they act. They watch over the commercial interests of the country for which they act, collect information, help nationals with advice, administer their property, register their births, deaths, and marriages, authenticate documents for legal purposes, and take depositions from witnesses. While they are not immune from civil or criminal proceedings, there is a general sentiment that, if possible, nothing should be allowed to interfere with their official duties or with the inviolability of their archives.

Subsection (6).—*Recognition of States.*

861. The recognition of a foreign Government may have important indirect effects in the administration of the municipal law of the State which grants recognition. The representatives and the property of the recognised foreign Government are immune from legal process. The validity of its acts in its own country cannot be questioned in the Courts of another State. British municipal law accords to the vessels of such States the immunity accorded to the vessels of States already duly recognised, even although the recognition is merely *de facto* and granted as a preliminary to consideration of their capacity for complete recognition.[2] In the case of *Luther* v. *Sagor* [3] the English Courts had to deal with a claim to certain timber which had been the property of the plaintiff

[1] *Mighell* v. *The Sultan of Johore*, [1894] 1 Q.B. 149; *Duff Development Co.* v. *Kelantan Government*, [1923] A.C. 395; [1924] A.C. 797.

[2] *The "Annette," The "Dora,"* [1919] P. 105.

[3] [1921] 1 K.B. 456; 3 K.B. 532

company in Russia. It was confiscated by legislation of the Soviet Government, sold by them, and subsequently brought to England by the purchaser. At the time when the case was heard by Roche J. the British Government had not recognised the Soviet Government, and he accordingly gave judgment for the plaintiffs; but before the case was heard by the Court of Appeal the Soviet had been recognised with retrospective effect as a *de facto* Government, and the Court therefore reversed the decision of Roche J., holding that the Soviet legislation had been effective to pass the title in the timber.

Subsection (7).—*Nationality.*

862. Individuals are never subjects but always objects of the law of nations, and nationality is the link between them and the law of nations. Nationality of an individual is his quality of being the subject of a certain State and therefore its citizen. It is not for international law but for municipal law to determine who is and who is not to be considered a subject. There are five modes of acquiring nationality: (1) by naturalisation; (2) by redintegration or resumption, whereby individuals may recover their original nationality on fulfilling certain conditions; (3) by the subjugation of territory after conquest; (4) by the cession of territory; and (5) the chief mode, by birth. The acquisition of nationality by other modes than by birth is exceptional. No uniform rules exist according to the municipal law of the different States concerning this matter. Some States have adopted the rule that parentage alone is the decisive factor. Other States have adopted the rule that the territory on which the birth occurs is the decisive factor. Other States, such as Great Britain and the United States of America, have adopted a mixed principle. According to their municipal law, not only the children of their subjects born at home or abroad become their subjects, but also such children of alien parents as are born on their territory.

863. Just as there are five modes of acquiring nationality, there are five modes of losing it, namely (1) release, whereby some States give their citizens the right to ask to be relieved of their nationality; (2) deprivation, whereby some States, for example Italy, deprive a subject of nationality if he enters into foreign civil or military service without permission; (3) expiration, whereby some States have provided that citizenship expires in the case of their subjects who have left the country and stayed abroad a certain length of time; (4) renunciation, whereby some States, for example Great Britain, while declaring that a child born of foreign parents on their territory is their natural-born subject, although he becomes at the same time, according to the municipal law of the home State of the parents, the subject of that State, give the right to such child to make after coming of age a declaration that he desires to cease to be a citizen; (5) substitution. According to the law of many States, for example Great Britain, the nationality of their subjects is extinguished *ipso facto* by their naturalisation abroad.

Section 6.—The Limitation of the Employment of Force for the Recovery of Contract Debts.

864. Of the Conventions and Declarations drawn up at The Hague in 1899 and 1907,[1] only two can be said to have survived the late war: the Convention for the Pacific Settlement of International Disputes, and the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. This Convention was signed at The Hague on 18th October 1907 and ratified by Great Britain on 27th November 1909. It proceeds on the preamble that the signatory Powers are desirous of avoiding between nations armed conflicts of a pecuniary origin arising from contract debts which are claimed from the Government of one country by the Government of another country as due to its nationals. The contracting Powers agree not to have recourse to armed force for the recovery of such debts. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after arbitration, fails to submit to the award. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment. The employment of force amounting to war, or threat of war, is, however, now declared by Article XI. of the Covenant of the League of Nations (1919) to be a matter of concern to all the member States of the League.

Section 7.—International Organisation.

Subsection (1).—*The League of Nations.*

865. The development of the methods of international co-operation has made rapid strides since the formation of the International Telegraphic Union in 1865. The conception of a League of Nations is not new, but is as old as international law, for any sort of international law and some sort or other of a League of Nations are interdependent and co-relative ideas. The organisation of the Family of Nations in a League of Nations, which is in effect a league of independent States, was one of the results of the war of 1914–1919. The Covenant of the League of Nations forms Part I. of the Treaties of Peace concluded between the Allied Powers and Germany, Austria, Hungary, and Bulgaria. The Treaty of Peace with Germany (the Treaty of Versailles), and with it the Covenant of the League of Nations, came into force on 10th January 1920. The purposes of the League are (1) the maintenance of international peace, and (2) the promotion of international co-operation. The members of the League fall into two classes the original members and those admitted later. The most important countries which are not members of the League are the United

[1] Scott, The Hague Conventions and Declarations of 1899 and 1907, p. 89.

States of America, the Union of Socialist Soviet Republics, the United States of Brazil, Turkey, and Mexico. The Covenant of the League contains clauses which relate to the prevention and settlement of disputes, and which bind the members of the League not to employ force for the settlement of a dispute unless in certain specified circumstances. The machinery of the League consists of (1) the Assembly, which meets annually at Geneva and which consists of three representatives from every member State, each State having one vote; (2) the Council, which meets four times a year. This is a smaller body than the Assembly. Great Britain, France, Italy, Germany, and Japan are permanent members, and at present nine other States are elected by the Assembly as temporary members; (3) the Secretariat or Civil Service of the League, which is composed of nationals of all the member States. Closely connected with the League is the International Labour Office, which has a parallel organisation of its own at Geneva and which was set up by Part XIII. of the Treaty of Versailles. In the Assembly and in the Council it is possible to discern the embryo of an International Legislature and an International Executive.[1]

Subsection (2).—*Methods for the Amicable Settlement of State Differences.*

866. The following are the principal methods for the amicable settlement of State differences:—

(1) Political or legal State differences.
- (*a*) Negotiation.
- (*b*) Good offices and mediation.
- (*c*) Conciliation.[2]
- (*d*) Reference to the Council or to the Assembly of the League of Nations.
- (*e*) Arbitration.
- (*f*) Arbitration according to The Hague Conventions of 1899 and 1907, *i.e.* the Permanent Court of Arbitration.

(2) Legal State differences. The Permanent Court of International Justice which has—
- (*a*) Voluntary jurisdiction, *i.e.* cases which States agree to submit to the Court (e.g. *The "Lotus"* case, between France and Turkey).
- (*b*) Conventional jurisdiction, *e.g.* under Treaties which relate to minorities, mandates, etc. etc.

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[1] Woolf, International Government (1916); Sir Frederick Pollock, The League of Nations (1922); Butler, A Handbook to the League of Nations (1928); the publications of the Information Section of the League of Nations Secretariat, Geneva; the Official Journal and the Monthly Summary of the League, published in English by Messrs. Constable & Co.

[2] Permanent Conciliation Commissions have been constituted under the Locarno Treaties of 1925.

(*c*) Compulsory jurisdiction in the case of those States which have signed the Optional Clause.

(*d*) Advisory jurisdiction, *e.g.* the Assembly or the Council of the League may ask and obtain an opinion on a point of law just as the British Crown may consult the Judicial Committee of the Privy Council.

(i) *The Permanent Court of Arbitration.*

867. The Permanent Court of Arbitration was created by The Hague Convention for the Pacific Settlement of International Disputes made in 1899 and revised in 1907. Each State signatory to the Convention appoints four members, and when two States refer a dispute to the Court, each, unless they agree otherwise, selects two arbitrators, of whom only one may be a national, and the four arbitrators then choose an umpire. "Permanent Court" is a misnomer. There is a Permanent Panel of Arbiters, but the Court itself has to be constituted anew for each case.

(ii) *The Permanent Court of International Justice.*

868. The Permanent Court of International Justice was created in 1921 by a Treaty generally called the Statute of the Court. The Court consists of eleven judges and four deputy judges, elected by the Assembly and the Council of the League of Nations in accordance with a special procedure with a view to the representation of the main forms of civilisation and the principal legal systems of the world. The seat of the Court is at The Hague. It is in permanent session, and organised on lines which resemble the organisation of the Supreme Court of the United States of America. The jurisdiction of the Court is of four kinds. It can hear and determine cases which States agree to submit to it. Under many post-war Treaties it has had conferred on it by agreement between the parties a jurisdiction in certain specified cases relating, for example, to questions of minorities and mandates. The Court may also give an advisory opinion on a question submitted to it by the Assembly or the Council of the League of Nations. And in certain cases involving questions of international law the Court has a compulsory jurisdiction as between States which have signed Article XXXVI. of the statute known as the Optional Clause, which is in the following terms: "The members of the League of Nations . . . may . . . declare that they recognise as compulsory *ipso facto* and without special agreement in relation to any other member or State accepting the same obligation the jurisdiction of the Court in all or any of the classes of legal disputes concerning

(*a*) The interpretation of a treaty;

(*b*) any question of international law;

(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to may be made unconditionally or on condition of reciprocity on the part of several or certain members or States or for a certain time." The statute of the Court is likely to be revised by the Assembly and Council of the League in 1929 in the light of the experience gained since its institution.

869. The relation between the Court and the League of Nations is similar to that which exists between the Law Courts and the Government in this country. The judges are appointed by the State, but the State cannot remove them. There can be no dictation or interference by the Government with the Law Courts. Indeed the Law Courts can give decisions on what the State itself has done, though ultimately the authority of the Law Courts derives from the Government. Although the International Court of Justice was created by the machinery of the League of Nations, its judgments are in no way subject to advice or revision by the Council or by the Assembly of the League. The official languages are French and English. States, party-litigants, may be represented by counsel or by agents who are instructed as a rule by the Foreign Offices concerned.[1]

Section 8.—War and Neutrality.

870. The law of war and neutrality has been left in complete confusion by the events of the war of 1914–1919. For the general effects of the outbreak of war the reader is referred to the work cited below.[2] It is no exaggeration to say that since the late war it has become impossible to forecast the future of the law of war either on land or at sea or in the air. An attempt was made at The Hague in 1923 to draft a Code of Rules to regulate the use of aircraft and radio in time of war, but the draft code has not been proceeded with.

871. The preoccupation of writers and statesmen with the law of war has been a real obstacle to the progress of international law, as it is only by the development of the law of peace that a stable system can be built up. The international law relating to blockade and contraband was framed without reference to the new conditions which have been introduced into warfare by the advance of science. Of vital importance to the British long-distance blockade of Germany was Lord Stowell's famous doctrine of continuous voyage. This doctrine consists in treating an adventure which involves the carriage of goods in the first instance to a neutral port, and thence to some ulterior and hostile destination, as being for certain purposes only one transportation, with all the consequences which would attach if the neutral port had not been interposed. The British Prize Courts applied and developed this

[1] Fachiri, The Permanent Court of International Justice (1925); Hudson, The Permanent Court of International Justice; Judge de Bustamante, The World Court. The Court's official publications include: Series A, Collection of Judgments; Series B, Collection of Advisory Opinions; Series E, Annual Reports, published at Leyden by A. W. Sijthoff's Publishing Co.

[2] Oppenheim, International Law, 4th ed., ii. (1926), 200.

doctrine during the war of 1914–1919. The old conceptions are wholly obsolete. In modern warfare whole nations are in the field, national existences are at stake, the commerce of the world is on the sea to win or lose, and the combatants are tempted to do anything which will shorten hostilities and tend to a decisive issue. It would be idle to pretend that the German doctrine that in warfare "necessity knows no law" is dead, or that it is confined to Germany.

872. Matters have been further complicated by the general signature and ratification of the Pact of Paris of 1928 which contains the following Articles:—

Article I. The High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

873. The future of the law of neutrality is complicated by the existence of the League of Nations and of the Pact of Paris of 1928. For a detailed discussion of the matter the reader is referred to the work undernoted.[1]

Section 9.—The Codification of International Law.

874. A Committee of the League of Nations has been established to deal with "the progressive codification of international law. Three topics have been selected as suitable for codification, namely,

(1) Nationality;
(2) Territorial Waters; and
(3) the Responsibility of States in respect of injuries caused in their territory to the person or property of foreigners.

The labours of the Committee are, however, only at a preliminary stage.

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[1] The Future of Neutrality, by Quincy Wright, Professor of International Law, University of Chicago, published by the Carnegie Endowment for International Peace (International Conciliation Pamphlets, No. 242 (September 1928)).

INTERNATIONAL PRIVATE LAW.

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Section 1.—Introduction.

875. The title "International Private Law" is the one generally recognised by the Scottish Universities, and has been used by many of the text-writers.[1] The phrase "Private International Law"[2] is open to the objection that international law governs the relations of states, and this the present subject does not do. The name "Conflict of Laws" has been widely used, especially in England and the United States.[3] Such a title refers to the choice of law to be applied, and ignores the equally important question of jurisdiction. Besides, there is no real conflict of laws, each state, through its judiciary, being free to choose the particular law which it considers applicable to any given question.

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[1] See Holland, Jurisprudence, 13th ed., p. 419.

[2] *Ibid.*, p. 420.

[3] *Ibid.*, p. 417; *cf.* Dicey, Conflict of Laws, 4th ed., 1927; Story, Conflict of Laws, 8th ed., 1883.

"Choice," or even "competition," of laws would be a more accurate name.[1]

876. International private law is "that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws." [2] It is concerned with the applicability of a state's law to (*a*) persons subject to the jurisdiction of other states, or (*b*) legal relations entered into in view of the law of states other than that within whose Courts the dispute falls to be determined. It is part of the municipal law of each country, but no law binding *proprio vigore* upon any independent state can be established by generalisation from the jurisprudence of other nations. There are few generally accepted principles of international private law which are not modified in their local application.[3] When we speak of "the law of Scotland" we may mean the local or territorial law, or we may use the phrase in a wider significance to include the rules or directions followed by Scots judges as to the limits of jurisdiction and as to the choice of competing laws.[4] In the latter sense Scots law includes part of international law. So we ought to think of it, not as one body of international private law, but rather as many international private laws, each a part of the corresponding national or municipal law.[5]

Section 2.—Historical Development.

877. International private law arises out of the necessities of trade and intercourse between foreigners, and although a person who was not a citizen was regarded, even in civilised states, as an outlaw, sanctions were required to regulate his dealings with the citizen. Thus, prior to its codification, the Roman law consisted of two parts—one the *jus civile*, which could only be used in settling disputes between Roman citizens, and the other the so-called *jus gentium*, existing side by side with the *jus civile* and regulating disputes involving foreigners. We are not here concerned with the nature and origin of this *jus gentium*, or as to whether it was built up from customs common to neighbouring peoples and based on natural reason or whether it was simply a development of the law merchant.[6] It was developed by the prætorian edict, and eventually came to exercise a great influence over the *jus civile*. It is important to note, however, (1) that it did not lay down rules for determining a choice of law from one of several given systems. It was really a first substitute for international law rather than inter-

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[1] See *Watson* v. *Renton*, 1792, Bell's Oct. Cas., per Lord Braxfield at p. 106.

[2] Westlake, Private International Law, 7th ed. (1925), p. 1.

[3] See *Ewing* v. *Orr Ewing*, 1885, 10 App. Cas. 453, per Lord Selborne at p. 513.

[4] See *Dalrymple* v. *Dalrymple*, 1811, 2 Hagg. C.R., per Lord Stowell, pp. 54, 58, and 59; see Renvoi, para. 930, *infra*.

[5] *Mortensen* v. *Peters*, 1906, 8 F. (J.) 93, per Lord Justice-General at p. 101; but cp. von Bar, Private International Law (Gillespie), 2nd ed., p. 2.

[6] See Sir Henry Maine's Ancient Law; Bryce, Studies in History and Jurisprudence, Vol. I.; Salmond, Jurisprudence, 7th ed., p. 29.

national law itself. (2) The early *jus civile* was not the territorial law of Rome, but the personal law of the Romans.[1]

878. With the grant of citizenship to all free inhabitants of the Roman Empire law became territorial in its application. On the break-up of the Empire, however, it once more became personal, and on a man's race depended such questions as his status, succession, and even his contracts.[2] This method persisted into the Mediæval period, but gradually gave way before various influences. Territorial jurisdiction was assumed by a vast number of small states, independent cities, etc., and the local law became dominant in the feudal Court. At the same time the *Jus Civile*, largely through the work of the glossators and commentators, recovered its position, and the statute theory was evolved. Put briefly, the Roman law was generally applied in the absence of some local legislative enactment covering the matter in dispute. An attempt was made to classify these local laws, as (*a*) *statuta personalia—e.g.* affecting questions of status—which were personal in their application; (*b*) *statuta realia*, dealing with property, which were territorial in their application; and (*c*) *statuta mixta*, dealing with formalities governing legal acts and with procedure. These, again, were territorial in their application.

879. The statute theory did not stand analysis. In Scotland the influence of the continental writers on international law was enhanced by the growing practice of Scots students attending foreign, and particularly Dutch, universities. Stair seems to have thought that in case of a conflict the decision should accord with Roman law or the law of nature, and there was a tendency in the Scots Courts to work out a kind of new Scots *jus gentium* for foreigners.[3] But by the seventeenth century the doctrine of comity was devised, mainly by the Dutch jurists, of whom Huber was the chief.[4] In effect, a tribunal would decide every question by its own law unless influenced by considerations of international comity or courtesy. Huber laid it down that the sovereign power in each state does, on this basis, in fact admit the laws of other states.[5] "Comity," says Story,[6] "is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territory of another." The doctrine has been expressly approved by various writers.[7] Other writers criticise and have disapproved of it.[8] It may now be regarded as out of date,

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[1] See Salmond, Jurisprudence, 7th ed., p. 89.

[2] Cp. Holland, Jurisprudence, 13th ed., p. 413.

[3] Miller, Law of Nature and Nations in Scotland, p. 108 *et seq.*

[4] See Huber, *De Conflictu Legum*; Story, Conflict of Laws, s. 29.

[5] See Westlake's Commentary on Huber's Axioms, 7th ed., p. 20 *et seq.*

[6] Sec. 38.

[7] Phillimore, Private International Law, Vol. IV.; Story (*supra*, and s. 33); Ersk. Inst. iii. 2, 39 (and cp. Inst. iv. 34, where he contrasts laws enforced *ex necessitate* with those enforced *ex comitate*).

[8] Wharton, Conflict of Laws, 3rd ed., pp. 5–12; von Bar, Private International Law (Gillespie), 2nd ed., pp. 2, 77, and 942; *Warrender* v. *Warrender*, 1855, 2 Cl. & Fin. 529; *Yates* v. *Thomson*, 1835, 3 Cl. & Fin. 544, per Lord Brougham at p. 586.

and disputations concerning it "little better than examples of idle logomachy." [1]

880. This idea of comity almost necessarily involved the idea of reciprocity, *i.e.* that Courts should be influenced in their choice of law by considerations of reciprocal recognition on the part of the Courts of the country chosen. It may be stated that the tendency of European countries and America has been to rely on the doctrine of reciprocity, especially where the recognition of a foreign judgment is concerned.[2] The truth is that the Courts now no longer require to search for some philosophical or theoretical reason for the recognition and application of one legal system by the Courts of another. Social and, more particularly, economic intercourse between the different nationals has made such recognition and application a practical necessity.

Section 3.—Choice of Law.

Subsection (1).—*Introductory.*

881. The subject of international private law can be conveniently treated under three heads. (1) Choice of forum, *i.e.* in which Court does the matter in dispute fall to be determined? This is a question of jurisdiction, and in most of the recent authorities jurisdiction has been abstracted and treated quite separately. Accordingly, reference is simply made under this head to the article on that subject.[3] (2) Choice of law. (3) The recognition of foreign judgments.[4] As a preliminary, however, it must be kept clearly in mind that our Courts do not know the foreign law. If foreign law is sought to be applied it must be averred and founded on, and the party relying upon it must adduce competent evidence as to what the foreign law is. In other words, foreign law is, so far as our Courts are concerned, a question of fact. Witnesses speaking to it are treated as skilled witnesses in much the same way as medical experts.[5]

882. The laws which generally come into conflict or competition with the *lex fori* (*i.e.* the Court's own law) are (*a*) the law of a person's nationality—*lex ligeantiæ*; (*b*) the law of a person's domicile—*lex domicilii*; (*c*) the law of the place where the subject of the litigation is situated —*lex rei sitæ* or *lex situs*; (*d*) the law of the place where a legal act (*e.g.* a contract) is executed or falls to be performed—*lex loci actus* (applicable to the formal execution of a deed), *lex loci contractus* (the place where a contract is made), *lex loci solutionis* (the place where a

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[1] Dicey, Conflict of Laws, 4th ed., p. 9.

[2] See Recognition of Foreign Judgments, para. 916 *et seq.*, *infra*; *Hilton* v. *Guyot*, 1895, 159 U.S. 113. In a Scots Act as early as 1612, dealing with the return of persons accused of crime in England who had fled to Scotland, it was provided that the Act was only to operate if the English passed a like Act.

[3] Jurisdiction, *infra*.

[4] *Infra*, para. 916 *et seq.*

[5] See Evidence, Vol. VI. p. 410 *ante*, paras. 873 and 874 and authorities cited; cf. *Higgin's Trs.* v. *Ewing's Trs.*, 1925 S.C. 440.

contract falls to be performed); (*e*) the law of the place where a wrongful act is committed—*lex loci delicti commissi*.[1]

Subsection (2).—*The Relation of Matters of Procedure and Diligence to the* lex fori.

883. Generally speaking, all matters of procedure and remedy and employment of diligence are governed by the *lex fori*.[2] Thus the question in what name an action should be brought is one regulated by the *lex fori*;[3] but not necessarily title to sue where a distinction may fall to be made between the nature of a right itself and the enforcement thereof.[4] Similarly, the question of who should be made defenders is one for the *lex fori*,[5] but not if it involves legal right and not remedy.[6]

884. Questions of evidence are ruled by the *lex fori*. A Court always applies its own rules of evidence.[7]

885. The relation of the *lex fori* to the limitation of a right of action depends upon the precise nature of the right and its corresponding obligation. In this connection rights and obligations are of two classes: (1) Some obligations prescribe after a certain period to the effect that they cease to exist, and the right to demand performance disappears along with the duty to perform, *e.g.* the long negative prescription. (2) Other obligations prescribe only in the sense that after a certain period the law refuses a right of action, *e.g.* the triennial prescription. If the limitation is of the former class it must be imposed by the *lex contractus*;[8] if of the latter class it is regarded as affecting only the remedy or right of action, and must be a limitation imposed by the *lex fori*.[9]

886. Set-off or compensation, being a matter of remedy or procedure, is governed by the *lex fori*.[10]

Subsection (3).—*Status*.

887. Status is a person's capacity for acquiring and exercising legal rights and performing legal duties.[11] On the question of what law

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[1] *Cf.* Holland, Jurisprudence, 13th ed., pp. 415, 416.

[2] Westlake, p. 420; Dicey, p. 797 *et seq.*; *Thorburn* v. *Dempster*, 1900, 2 F. 583; *Don* v. *Lippmann*, 1837, 5 Cl. & Fin. 1 at p. 13, per Lord Brougham.

[3] *Jones* v. *Somerville's Trs.*, 1907 S.C. 545; *Banque Internationale de Commerce de Petrograd* v. *Gonkassow*, [1923] 2 K.B. 682, per Scrutton L.J. at p. 690.

[4] Dicey, p. 799; *Alison* v. *Furnival*, 1834, 1 C.M. & R. 277; cf. *Yzquierdo* v. *Clydebank Engineering Co.*, 1902, 4 F. (H.L.) 31.

[5] *Bullock* v. *Caird*, 1875, L.R. 10 Q.B. 276; cf. *In re Doetch*, [1896] 2 Ch. 836; see *Tayler* v. *Scot*, 1847, 9 D. 1504.

[6] *General Steam Navigation Co.* v. *Guillon*, 1843, 11 M. & W. 877.

[7] Dicey, p. 797 *et seq.*; Westlake, p. 422; *Leroux* v. *Brown*, 1852, 12 C.B. 801; *Bain* v. *Whitehaven Rly. Co.*, 1850, 3 H.L.C. 1; *Re Scholefield*, [1905] 2 Ch. 408.

[8] *Alexander* v. *Badenoch*, 1843, 6 D. 322; *Don* v. *Lippmann*, 1837, 5 Cl. & Fin. 1.

[9] *Don* v. *Lippmann*, *supra*; *British Linen Co.* v. *Drummond*, 1830, 10 B. & C. 903; *Fergusson* v. *Fyffe*, 1841, 8 Cl. & Fin. 121; *Harris* v. *Quine*, 1869, L.R. 4 Q.B. 653; see argument in *Higgins* v. *Ewing's Trs.*, 1925 S.C. 440; *cf.* Westlake, p. 421, s. 343.

[10] Westlake, s. 346; *Meyer* v. *Dresser*, 1864, 16 C.B. 646.

[11] Dicey, p. 509.

determines a person's status, the legal systems of the world are divided into two groups. In the systems of the British Empire and the United States the personal law is regulated by the domicile of the individual concerned;[1] in continental Europe and elsewhere by the nationality or political allegiance.[2]

Subsection (4).—*Husband and Wife.*

(i) *Marriage.*

888. Marriage must be a union which the *lex fori* will recognise as such, and has been defined as "the voluntary union for life of one man and one woman to the exclusion of all others."[3] So if an alleged foreign marriage is founded on in our Courts it must conform to our idea of marriage, and must be monogamous. Thus, the union of an Englishman with a woman of a polygamous tribe, although entered into with solemn ceremony, was held not to constitute a marriage.[4] On the other hand, a marriage, though made between persons who are not Christians, is perfectly valid if it contemplates the monogamy and permanency required by the Courts of this country;[5] and there is nothing to prevent a Mohammedan, for example, entering into a marriage in this country to which the incidents of a monogamous marriage necessarily attach,[6] or even a Hindu, although such a marriage would be invalid within India.[7]

(ii) *Capacity to Marry and Formal Validity.*

889. Much difficulty has been created by the tendency of the English Courts to confuse the substance of a marriage with its form, and to render uncertain the question whether capacity to contract marriage is ruled by the *lex domicilii* or the *lex loci celebrationis*, or both.[8] Recent Scots judicial opinion is to the effect that the capacity of parties to contract marriage is ruled primarily by the laws of their respective domiciles, but that each must also satisfy the law as to capacity of the *lex loci celebrationis*.[9]

890. The validity of a marriage in point of form is ruled by the *lex loci celebrationis*,[10] subject to these qualifications. (*a*) By the Foreign Marriages Act, 1892,[11] when one of the contracting parties is British,

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[1] See Domicile, Vol. VI. p. 38 *ante*.

[2] See Aliens, Vol. I. p. 261 *ante*, and statutes therein referred to.

[3] *Hyde* v. *Hyde*, 1866, L.R. 1 P.D., per Lord Penzance at p. 133.

[4] *Bethell* v. *Hildyard*, 1888, 38 Ch.D. 220; *Hyde* v. *Hyde*, *supra*.

[5] *Brinkley* v. *Attorney-General*, 1890, 15 P.D. 76.

[6] *Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634; *Chetti* v. *Chetti*, [1909] P. 67; see *Lendrum* v. *Chakravarti*, 1929, S.L.T. 96, where the authorities are very fully reviewed.

[7] *Lendrum* v. *Chakravarti*, *supra*.

[8] Cp. *Simonin* v. *Mallac*, 1860, 2 Sw. & Tr. 67, and *Sottomayor* v. *De Barros*, 1879, 5 P.D. 94; *Ogden* v. *Ogden*, [1908] P. 46; with *Mette* v. *Mette*, 1859, 1 Sw. & Tr. 416, and *Re Bozzelli's Settlement*, [1902] 2 Ch. 751; see comments in *Administrator of Austrian Property* v. *von Lorang*, 1927 S.C. (H.L.) 80, and *Lendrum* v. *Chakravarti*, *supra*.

[9] *Lendrum* v. *Chakravarti*, *supra*; *cf.* Westlake, p. 57, s. 21 *et seq.*

[10] Westlake, p. 57, s. 20; Dicey, p. 686 *et seq.*; Fraser, Husband and Wife, ii. 1309; Walton, Husband and Wife, 2nd ed., p. 315 *et seq.*

[11] 55 & 56 Vict. c. 23.

marriage may be celebrated abroad before a marriage officer (*e.g.* a consul), and will be as valid as if duly solemnised in the United Kingdom.[1] (*b*) In virtue of the doctrine of exterritoriality, a portion of a foreign country may be regarded as a portion of the United Kingdom, so that a marriage in an ambassador's official residence, a British factory, or on a British ship on the high seas would, if one of the parties was domiciled in Scotland, be valid in Scotland if contracted in any manner which would have made it a good marriage had Scotland been the *locus celebrationis*.[2] (*c*) When there is no civilised *lex loci*, or where in a civilised country parties are excluded from availing themselves of the *lex loci*, they may carry their own law with them; *e.g.* if the evidence of matrimonial consent would have been sufficient had Scotland been the *locus celebrationis*, the Scottish Courts will regard the marriage as valid.[3] (*d*) The validity of marriages between British Europeans in India is ruled by the Indian Marriage Act.[4]

891. Where an impediment to re-marriage is of a *quasi*-penal nature the personal disability to re-marry will not follow the person into another jurisdiction which does not impose a like penalty, at any rate where the domicile is changed, *e.g.* where the defender and co-defender in an action of divorce for adultery are prohibited from re-marrying;[5] but where the law under which divorce has been pronounced prohibits the marriage of either spouse within a given time (*i.e.* where the marriage tie is not finally loosed), incapacity to re-marry would adhere to them in other jurisdictions.[6]

(iii) *Patrimonial Effects of Marriage and Divorce.*

892. Primarily every right to heritage is regulated by the *lex rei sitæ*.[7] As regards moveables, the property rights of husband and wife are ruled, in the absence of express contract, by the *lex domicilii*—that is, the *lex domicilii* of the husband[8]—at the date of the marriage; and the husband cannot, by changing the domicile, prejudice the wife's rights of property acquired on marriage.[9] The rule is that where there is a contract, whether express or implied by law, proprietary rights acquired on marriage shall not be altered.[10] On the other hand, mere rights of succession consisting in a *spes* which is defeasible (*e.g.* legitim, *jus relictæ*) are affected by any subsequent change of domicile.[11]

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[1] *Hay* v. *Northcote*, [1900] 2 Ch. 262. [2] Walton, p. 320 *et seq.*

[3] Walton, p. 326; *Lautour* v. *Teesdale*, 1816, 8 Taun. 830; *Phillips* v. *Phillips*, 1922, 38 T.L.R. 150.

[4] Act 15 of 1872; see Walton, p. 328.

[5] *Beattie* v. *Beattie*, 1866, 5 M. 181; *Scott* v. *Attorney-General*, 1886, 11 P.D. 128; Westlake, p. 88; Walton, p. 331.

[6] *Warter* v. *Warter*, 1890, 15 P.D. 152.

[7] Ersk. iii. 2, 40; *Purvis' Trs.* v. *Purvis' Exrs.*, 1861, 23 D. 812; *Welch* v. *Tennent*, 1891, 18 R. (H.L.) 72; see Walton, pp. 347, 348; cp. Westlake, p. 72, s. 35.

[8] Westlake, p. 72, s. 36; *Duchess of Buckingham* v. *Winterbottom*, 1851, 13 D. 1129.

[9] Savigny, Private International Law (trans. Guthrie), p. 293; Westlake, pp. 72–74; *De Nicols* v. *Curlier*, [1900] A.C. 21. [10] *De Nicols* v. *Curlier*, *supra*.

[11] *Lashley* v. *Hog*, 1804, 4 Pat. 581; *Trevelyan* v. *Trevelyan*, 1873, 11 M. 516.

893. Where there is a marriage contract the law regulating the rights of the spouses will be that which they intend to govern the contract.[1] Such intention may be expressed in the deed or implied from its terms. Thus the phraseology or provisions of the deed may indicate whether the parties intended their mutual rights of property to be ruled by the *lex loci contractus* [2] or *loci solutionis*.[3]

Subsection (5).—*Parent and Child.*

894. If by the law of a child's domicile at birth (the child's domicile being that of the father) it has the status of legitimacy, that status will be universally recognised,[4] except that in a question of succession to heritage the *lex rei sitæ* would rule.[5] It is perhaps doubtful to what extent a marriage (*e.g.* a Mohammedan one) which would not be recognised as such in the law Courts of a Christian country may none the less confer legitimacy upon the issue.[6] If a child born out of wedlock is to be legitimated *per subsequens matrimonium* there is a preponderance of authority for the view that the *lex domicilii* of the father, both at the date of birth and at the date of marriage, must allow of legitimation in this way. The theory is that the potentiality or otherwise of being legitimated attaches at birth; and, further, that it would be illogical to allow legitimation if the *lex domicilii* at the time of marriage denied it.[7] It should be observed, however, that the English Legitimacy Act, 1926,[8] gives statutory sanction to legitimation *per subsequens matrimonium*, and that marriage not birth is the date looked to, legitimation taking place if at the date of the marriage the father has a domicile in England or Wales.[9]

Subsection (6).—*Guardianship.*

895. The primary jurisdiction to appoint a guardian resides in the Court of the ward's domicile; and while the Courts in Scotland will appoint a guardian whenever necessary to protect the person or property of a minor or a lunatic, preference will be given to the guardian (if any)

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[1] *Earl of Stair* v. *Head*, 1844, 6 D. 905; *Montgomery* v. *Zarifi*, 1918 S.C. (H.L.) 128.

[2] *Corbett* v. *Waddell*, 1879, 7 R. 200; *Sawrey-Cookson* v. *Sawrey-Cookson's Trs.*, 1905, 8 F. 157; *Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204; *Battye's Tr.* v. *Battye*, 1917 S.C. 385; *Montgomery* v. *Zarifi*, *supra*.

[3] *Earl of Stair* v. *Head*, *supra*; *Durrant Steuart's Trs.* v. *Durrant Steuart*, 1891, 18 R. 1114.

[4] *Fenton* v. *Livingstone*, 1856, 18 D., per Lord Ardmillan at p. 875; see Domicile, Vol. VI. p. 38 *ante*.

[5] *Fenton* v. *Livingstone*, 1859, 3 Macq. 497, per Lord Cranworth at p. 544 and Lord Chelmsford at p. 559; see *Birtwhistle* v. *Vardill*, 1840, 7 Cl. & Fin. 895.

[6] *Hyde* v. *Hyde*, 1886, 1 P. & D., per Lord Penzance at p. 138; *In re Ullee*, 1885, 53 L.T. (N.S.) 711, per Chitty J. at p. 713; see Westlake, p. 105 note; cp. *Roche* v. *Washington, U.S.A.*, 1862, 19 Ind. Rep. 53; *Blyth* v. *Ayres*, 1892, 96 Cal. Rep. 532.

[7] Westlake, ss. 54 and 55; *Munro* v. *Munro*, 1840, 7 Cl. & Fin. 842; *In re Wright's Trusts*, 1856, 2 K. & J. 595; *Sidney* v. *Sidney*, 1869, 7 M. (H.L.) 89; *Goodman* v. *Goodman*, 1881, 17 Ch. D. 266; *Re Grove*, 1888, 40 Ch. D. 216; but cp. Lord Brougham in *Munro* v. *Munro*, *supra*, at p. 882, where stress is laid on domicile at date of marriage.

[8] 16 & 17 Geo. V. c. 60.

[9] Secs. 1 (1) and 8 (1). Note that the Act allows a legitimated person to succeed to land, thus sweeping aside the decision in *Birtwhistle* v. *Vardill*, *supra*; see ss. 3 (1) and 8 (2).

appointed by the Court of the domicile.[1] A guardian appointed by the Court of the domicile has a title to uplift moveable estate or to raise an action with reference to the ward's moveable estate in Scotland without the necessity of a separate Scots appointment.[2] Control of Scots heritage, however, requires a separate appointment by the Scots Courts.[3] It follows that, where a guardian exists who derives his authority from the *lex domicilii*, the Courts of any other country with jurisdiction over the person or property of the ward ought, *ex comitate*, to protect and assist that guardianship. For a time this principle was doubtful owing to the tendency of the English Court of Chancery to treat guardianship as purely local. Hence in 1843 it was held that a guardian appointed by the Court of the domicile in Scotland had no authority in England.[4] This doctrine was modified in the *Marquis of Bute* cases,[5] and the English Courts now have regard for the rights of guardians already in office.[6] The principle above enunciated, however, is subject to the qualification that the good of the ward is to be the predominant consideration.[7]

896. When a judicial factor is officially appointed an official extract of the appointment operates to transfer all the ward's moveable property within the British Dominions.[8] The Lunacy Act, 1890, provides for the control by a guardian appointed in England, Scotland, or Ireland of all moveable estate belonging to the lunatic in the United Kingdom.[9] Occasionally an emergency appointment of a guardian is necessary in a country other than that of the ward's domicile. This, however, will usually be *ad interim* only.[10]

Subsection (7).—*Contract.*

(i) *Capacity to Contract.*

897. Capacity to enter into a contract relating to immoveables is governed by the *lex rei sitæ*.[11] With regard to moveables, the law

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[1] See Duncan and Dykes on Jurisdiction, chap. xvi.; Fraser, Parent and Child, 3rd ed., p. 734 *et seq.*; Jurisdiction, *infra*.

[2] *Gordon* v. *Stair*, 1835, 13 S. 1073; *Sawyer* v. *Sloan*, 1875, 3 R. 271, per Lord Pres. at p. 272; Fraser, Parent and Child, *supra*, p. 734 *et seq.*; cp. *Seddon*, 1891, 19 R. 101, with *Seddon*, 1893, 20 R. 675; *cf.* Dicey, p. 526, Rule 144.

[3] *Ogilvy* v. *Ogilvy's Trs.*, 1927, S.L.T. 83. In this case the authorities are fully examined by Lord Moncrieff. See *M'Fadzean*, 1917 S.C, 142.

[4] *Johnstone* v. *Beattie*, 1843, 10 Cl. & Fin. 42. This was a majority judgment of three to two.

[5] *Stuart* v. *Moore*, 1860, 22 D. 1504; 23 D. 51, 446, 595, and 902; and *Stuart* v. *Stuart*, 1861, 4 Macq. 1.

[6] See Westlake, p. 45; cp. the dissenting judgments of Lords Brougham and Campbell in *Johnstone* v. *Beattie*; see Dicey, p. 527 *et seq.*

[7] *Stuart* v. *Stuart*, *supra*, per the Lord Chancellor at p. 60; see *Moncreiff*, 1891, 18 R. 1029; *Fenwick* v. *Hannah's Trs.*, 1893, 20 R. 848, per Lord Pres. at p. 851; see Guardianship of Infants Act, 1925 (15 & 16 Geo. V. c. 45); *Westergaarde* v. *Westergaarde*, 1914 S.C. 977.

[8] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39), s. 13; see *Mathieson*, 1857, 19 D. 917.

[9] Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 131; see *Morison*, 1901, 4 F. 144.

[10] *Reid* v. *Reid*, 1887, 24 S.L.R. 281.

[11] *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129; Story, s. 431; Westlake, p. 220; cf. *Foster* v. *Foster's Trs.*, 1923 S.C. 212.

regulating capacity depends to some extent on the nature of the contract itself. If the contract is a personal one (*e.g.* one affecting a person's status or domestic or personal relations), capacity to enter into it is ruled by the *lex domicilii*.[1] If, on the other hand, it is a mercantile one, capacity is governed by the *lex loci contractus*.[2]

(ii) *Formal Validity.*

898. Formal validity is, in the case of immoveables, ruled by the proper law of the contract, which is generally, although not necessarily, the *lex situs*,[3] and in the case of moveables by the *lex loci contractus*.[4]

(iii) *Constitution and Interpretation.*

899. The question as to whether a valid contract has been made, or as to what the meaning of a contract may be, is governed by the law which the parties intended, or are held to have intended. This is known as the proper law of the contract.[5] This rule is subject to various presumptions. When a contract is made in one country to be performed wholly or partially in another, the rule of English law is that *prima facie* it is to be construed and enforced according to the *lex loci contractus*, but the Court will look at all the circumstances to ascertain by the law of which country the parties intended it to be governed.[6] Some authorities, however, attach more weight to the *lex loci solutionis* when that differs from the *lex loci contractus*.[7] The preference should probably be given to that country with which the contract has the most real connection.[8]

900. Contracts relating to immoveables are similarly governed by their proper law, which, however, will be *prima facie* the *lex situs*.[9] Where the proper law is not that of the *lex situs*, it will apply only so far as the *lex situs* does not prevent the contract being carried out.[10]

(iv) *Transfer and Assignation of Specific Moveables.*

901. Questions as to the transfer or acquisition of property in corporeal moveables are generally decided by the *lex situs* of the move-

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[1] Dicey, p. 596 *et seq.* ; *Cooper* v. *Cooper*, 1888, 15 R. (H.L.) 21 ; see Westlake, pp. 40–42.

[2] *M'Feetridge* v. *Stewarts & Lloyds, Ltd.*, 1913 S.C. 773 ; *Male* v. *Roberts*, 1800, 3 Esp. 163 ; see Fraser, Parent and Child, 3rd ed., p. 723 *et seq.*, on capacity of minors.

[3] Dicey, p. 605 ; see " proper law," next para.

[4] Dicey, Rule 159, p. 603.

[5] Dicey, Rule 155, p. 591.

[6] *In re Missouri S.S. Co.*, 1889, 42 Ch.D. 321 ; *Jones* v. *Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730 ; see *Hamlyn & Co.* v. *Talisker Distillery*, 1894, 21 R. (H.L.) 21 ; *P. & O. Co.* v. *Shand*, 1865, 3 Moore's P.C. (N.S.) 272.

[7] *Valery* v. *Scott*, 1876, 3 R. 965 ; *Hamlyn* v. *Talisker Distillery*, 1894, 21 R. 204 ; *Pritchard* v. *Norton*, 1882, 106 U.S. 124 ; Story, s. 280, p. 376.

[8] Westlake, s. 212 ; *Ralli Bros.* v. *Compania Naviera Sota-y-Aznar*, [1920] 1 K.B. 614 ; [1920] 2 K.B. 287.

[9] Dicey, Rule 163 ; *Mackintosh* v. *May*, 1895, 22 R. 345.

[10] Westlake, s. 216 ; *British S. Africa Co.* v. *De Beers*, [1910] 2 Ch. at p. 514 ; *Cood* v. *Cood*, 1863, 33 L.J. Ch. 273 ; see Story, s. 424.

able.[1] On the other hand, similar questions relating to incorporeal moveables (*e.g.* a *jus crediti* in Scotland) are referable to the *lex loci contractus*, or, possibly, even to the *lex domicilii* on the basis of the maxim *mobilia personam sequuntur*.[2]

(v) *Law of the Flag.*

902. In the interpretation of contracts of affreightment there is a presumption in favour of the "law of the flag."[3] Strictly speaking, this means the law of the country whose flag the ship has the right to carry,[4] and where there are several local laws but only one flag (as in Great Britain and the U.S.A.) the law of the place of registry.[5] The phrase has, however, been interpreted in a wider sense as being equivalent to the personal law of the ship's owner, though the ship itself may carry a different flag.[6] In a Scots case, *The "Immanuel,"*[7] there are dicta which are difficult to reconcile with the English cases on the law of the flag, but the Court there held that the question was one of proof to be regulated by the *lex fori*, and it is thought that the Scots law does not differ from the English on the main legal principle. It must be kept in mind that the law of the flag is only a presumption, and that it will not apply if from the terms or objects of the contract the inference can be drawn that the parties intended a different law to regulate the matter.[8]

(vi) *Bills of Exchange.*

903. The application of principles of international private law to bills of exchange is the subject of statutory regulation in the Bills of Exchange Act, 1882.[9] It may be noted that some matters are referred to the *lex loci solutionis*.[10]

Subsection (8).—*Succession.*

(i) *Intestate Succession.*

904. Intestate succession to moveable estate is governed by the *lex domicilii* of the intestate at the time of decease; that to immoveable

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[1] Westlake, s. 202; *Cammell* v. *Sewell*, 1860, 29 L.J. Ex. 350; *Inglis* v. *Robertson & Baxter*, 1898, 25 R. (H.L.) 70; [1898] A.C. 616; see *Donaldson* v. *Ord*, 1855, 17 D., per Lord Justice-Clerk at p. 1068.

[2] *Tayler* v. *Scot*, 1847, 9 D. 1504; *Scottish Provident Institution* v. *Cohen*, 1888, 16 R. 112; *North-Western Bank* v. *Poynter*, 1894, 22 R. (H.L.) 1, per Lord Watson at p. 12; *Forbes* v. *Official Receiver*, 1924, S.L.T. 522; Dicey, Rule 154. Usually the *lex loci actus* and the *lex domicilii* will coincide, but the sounder view on principle seems to be that the maxim *mobilia personam sequuntur* applies to universal assignation rather than to the transfer of specific moveables.

[3] *Lloyd* v. *Guibert*, 1865, L.R. 1 Q.B. 115; see Carver, Carriage of Goods by Sea, 7th ed., ss. 204–211.

[4] Dicey, Rule 165; *Lloyd* v. *Guibert*, *supra*.

[5] Dicey, Rule 165; Wharton, Conflict of Laws, ss. 357 and 441.

[6] Westlake, s. 219; *Chartered Mercantile Bank of India* v. *Netherlands Steam Navigation Co.*, 1883, 10 Q.B.D. 535.

[7] *Owners of The "Immanuel"* v. *Denholm & Co.*, 1887, 15 R. 152.

[8] See Dicey, Rule 166.

[9] 45 & 46 Vict. c. 61, s. 72; see Bills of Exchange, *supra*, Vol. II. *ante*, at p. 249 *et seq.*

[10] *Ibid.*, ss. 72 (4) and 72 (5).

estate by the *lex rei sitæ*.[1] The *lex situs* determines the quality of estate, *i.e.* whether moveable or immoveable.[2] The right to legitim and *jus relictæ* depends on the *lex domicilii* of the deceased.[3] While the *lex domicilii* of the deceased determines the class of persons entitled to succeed to the moveable estate by reason of propinquity or otherwise, the admission of a particular person to the class may be referable to the *lex domicilii* of that person.[4]

905. The right of a particular state to take the property of an intestate who has no heirs depends on whether the right is regarded as supplementary to succession, in which case the country of the domicile would take,[5] or as the appropriation of *bona vacantia*, in which case the property would fall to the state in which it is situated.[6] It is thought that the latter view is the correct one.

906. Collation, as an incident of moveable succession, is regulated by the *lex domicilii*, and only takes place if it is a requirement of that law.[7] In order, however, that a person may be put to his election and required to collate before claiming moveables in Scotland, the *lex situs* of the immoveables must allow of the latter being rendered subject to the estate.[8]

(ii) *Testate Succession.*

(a) *Capacity to Test.*

907. Capacity to dispose *mortis causa* of immoveables is governed by the *lex situs*.[9] In the case of moveables the *lex domicilii* determines the question.[10] Although the authorities are not at one on the subject, it is thought that the *lex domicilii* at the time of making the will must rule, and that if there were capacity at that date the will would not be invalidated by a subsequent change of domicile.[11]

(b) *Essential Validity and Interpretation of Wills.*

908. The validity of a bequest is determined by the *lex situs* in the case of immoveables, and in the case of moveables by the *lex domicilii* of the testator[12] at the time of his death, when the succession opens.[13]

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[1] M'Laren, Wills and Succession, 3rd ed., p. 17, and authorities there cited; Dicey, pp. 558, 559 and Rule 193; *Doglioni* v. *Crispin*, 1866, L.R. 1 H.L. 301.

[2] M'Laren, p. 18. [3] M'Laren, p. 21.

[4] *In re Goodman's Trusts*, 1881, 17 Ch.D. 266; cp. *Smith's Trs.* v. *Macpherson's Trs.*, 1926 S.C. 983; *In re Androc*, 1883, 24 Ch.D. 637; see M'Laren, pp. 19–21.

[5] Savigny, Droit Romain, s. 377, tome 8, p. 311; Bar, Private International Law, s. 114; M'Laren, p. 22; see *Goldie* v. *Murray*, 1753, Mor. 3183.

[6] Bell's Prin., s. 1669; Westlake, s. 121(*a*); *In re Barnett's Trusts*, [1902] 1 Ch. 847; *Torrie* v. *Munsie*, 1832, 10 S. 597.

[7] *Hay-Balfour* v. *Scott*, 1793, 3 Pat. 300; *Robertson* v. *M'Vean*, 18th February 1817, F.C.

[8] *Brown's Trs.* v. *Gregson*, 1920 S.C. (H.L.) 87; see *Hewit's Trs.* v. *Lawson*, 1891, 18 R. 793. [9] M'Laren, pp. 23, 24; Dicey, pp. 554, 555. [10] M'Laren, s. 46.

[11] Cp. Story, s. 465, with Dicey, Rule 194 and p. 775; see Savigny, Conflict of Laws (Guthrie), 2nd ed., s. 393; M'Laren, p. 22, note 7; Dicey, Rule 197; cp. Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3. [12] M'Laren, ss. 43 and 47.

[13] Dicey, Rule 195 and p. 756; *Boe* v. *Anderson*, 1862, 24 D. 732; *Mayor of Canterbury* v. *Wyburn*, [1895] A.C. 89; cf. *Westerman's Exr.* v. *Schwab*, 1905, 8 F. 132, per Lord Pres. at p. 136 *et seq.*; see *Hewit's Trs.* v. *Lawson*, 1891, 18 R. 793.

The same considerations apply primarily to the interpretation of wills,[1] although Dicey refers the construction of wills conveying *immobilia* to the *lex domicilii* rather than the *lex situs*.[2] The intention of a testator, expressed or implied, as to the law applicable will, of course, be given effect to, and the use of words which have a technical meaning where the property is situated or where the will is executed may be regarded as indicating intention to deal with the estate according to the legal relations indicated by such language.[3]

(c) *Formal Validity of Wills.*

909. A will disposing of moveables may be authenticated either in the form prescribed by the *lex loci actus* or the *lex domicilii*;[4] one disposing of immoveable estate either according to the *lex loci actus* or *lex rei sitæ*.[5] In the case of immoveables, however, it would probably be unsafe to rely on the *lex loci actus* alone for authentication of an actual conveyance of heritage.[6]

910. The Wills Act of 1861[7] enacts that a will of moveables made outside the United Kingdom by a British subject shall "be held to be well executed if made according to the forms required either (1) by the law of the place where made, or (2) by the law of the place where the testator was domiciled when the same was made, or (3) by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin."[8] It is further enacted that every will of moveables made within the United Kingdom by a British subject, whatever his domicile, shall be held to be well executed if executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made;[9] and also that no will shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of a subsequent change of domicile of the person making the same.[10]

Subsection (9).—*Actionable Wrongs.*

911. Before an action will lie in Scotland in respect of a delict or *quasi*-delict, the act committed or omission to act complained of must

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[1] M'Laren, ss. 53, 55, 56; *Blackett* v. *Gilchrist*, 1832, 10 S. 590; see *Cunningham's Trs.* v. *Cunningham*, 1924 S.C. 581.

[2] 4th ed., p. 571. In any event, the application of the *lex rei sitæ* is confined to wills disposing of the heritage itself. Provisions, in their nature personal, although affecting heritable estate, are construed by the *lex domicilii*; see M'Laren, s. 57.

[3] M'Laren, ss. 55, 60, 61, 62; Dicey, p. 572; *Mitchell & Baxter* v. *Davies*, 1875, 3 R. 208; *Elliot's Trs.* v. *Waddell*, 1879, 7 R. 200; *Smith* v. *Smiths*, 1891, 18 R. 1036; *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53.

[4] M'Laren, s. 49; see *Purvis' Trs.* v. *Purvis' Exrs.*, 1861, 23 D. 812; *Macdonald* v. *Cuthbertson*, 1890, 18 R. 101, per Lord Pres. Inglis.

[5] M'Laren, *ibid.*; *Connel's Trs.* v. *Connel*, 1872, 10 M. 627.

[6] M'Laren, ss. 49 and 50.

[7] 24 & 25 Vict. c. 114.

[8] *Ibid.*, s. 1.

[9] *Ibid.*, s. 2.

[10] *Ibid.*, s. 3; see *Purvis' Trs.* v. *Purvis' Exrs.*, *supra*.

be an actionable wrong both by the *lex loci delicti* and the *lex fori*.[1] Thus an alleged wrongful act committed in England and sued upon in Scotland must be actionable by the law of both countries.[2] When an action was brought in Scotland in respect of an alleged wrong committed by one foreigner against another on the high seas it was held that the defender could not be made liable unless he would have been liable both by his own law and the law of the party injured.[3] But in an action brought in Scotland arising out of a collision between a British and a Spanish vessel in French territorial waters the *lex fori* was held to apply.[4]

Subsection (10).—*Bankruptcy.*

(i) *Vesting of Bankrupt's Moveable Property.*

912. The seat of a process of bankruptcy is, generally speaking, the domicile of the debtor.[5] Scots law recognises the unity of bankruptcy —that is to say, that a vesting order in the *forum domicilii* will carry the bankrupt's moveable assets wherever situated in accordance with the maxim *mobilia personam sequuntur*.[6] When a trading company has several trading domiciles, general bankruptcy may take place at any of them, but the law of that domicile where the process was first initiated regulates the distribution of the whole assets wherever situated.[7] The Bankruptcy (Scotland) Act, 1913, recognises the universal effect of the assignation resulting from the act and warrant vesting the trustee.[8]

(ii) *Vesting of Bankrupt's Heritable Property.*

913. The vesting and distribution of heritage is recognised by the Scots Courts as belonging primarily to the *forum* and *lex rei sitæ*.[9] By statute, however, heritable property in the United Kingdom and in the Dominions vests in the trustee under the vesting clause.[10] There is also statutory provision for each British Court acting in aid of and as auxiliary to all others in bankruptcy matters.[11]

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[1] *Evans & Sons* v. *Stein & Co.*, 1904, 7 F. 65; cp. *Convery* v. *Lanarkshire Tramways*, 1905, 8 F. 117.

[2] *Ross* v. *Sinhjee*, 1891, 19 R. 31; see *Soutar* v. *Peters*, 1912, 1 S.L.T. 111.

[3] *Kendrick* v. *Burnett*, 1897, 25 R. 82.

[4] *Owners of S.S. "Reresby"* v. *Owners of S.S. "Cobetas,"* 1923, S.L.T. 719.

[5] Goudy on Bankruptcy, 4th ed., p. 598.

[6] Goudy, p. 600; *Silkrig* v. *Davies*, 1814, 2 Dow 230; *Gœtze* v. *Aders*, 1874, 2 R. 150.

[7] *Royal Bank* v. *Stein Smith & Co.'s Assignees*, 1813, F.C. 72; *Gœtze* v. *Aders*, *supra*; see *Phosphate Sewage Co.* v. *Mollison*, 1878, 5 R. 1125, where Lord Pres. Inglis sums up the law in a series of propositions; *Obers* v. *Paton's Trs.*, 1897, 24 R. 719; *Araya* v. *Coghill*, 1921 S.C. 462; *Home's Tr.* v. *Home's Trs.*, 1926, S.L.T. 214.

[8] 3 & 4 Geo. V. c. 20, s. 97.

[9] Goudy, pp. 599 and 603; Bar, s. 483; Story, p. 385 *et seq.*; *Falconer* v. *Weston*, 18th November 1814, F.C.; *Weston* v. *Falconer*, 17th December 1817, F.C.

[10] Bankruptcy (Scotland) Act, 1913, s. 97; cp. Bankruptcy Act, 1914 (England), ss. 1, 38, and 167.

[11] Bankruptcy Act, 1914, s. 122; *Home's Tr.* v. *Home's Trs.*, *supra*.

(iii) *Discharge of Bankrupt.*

914. The Bankruptcy (Scotland) Act, 1913, provides that discharge in a process of sequestration in Scotland must receive effect within Great Britain and Ireland and the Dominions as a discharge of all debts capable of being ranked.[1] As regards discharge in a foreign country, it seems that the Scots Courts will recognise such discharge when it was granted in the country where the debt was contracted.[2]

(iv) *Jurisdiction.*

915. The requisites of jurisdiction to found bankruptcy are dealt with elsewhere.[3]

Section 4.—Foreign Judgments.

Subsection (1).—*Introductory.*

916. Under Roman law all jurisdictions held their authority from Rome, and accordingly the Courts of one territory were accustomed to regard as conclusive the judgments pronounced by the Courts of another territory deriving authority from the same sovereign. This was followed, after the break-up of Rome, by a period of nationalism, in which a judgment was strictly confined to the territory over which the particular Court had jurisdiction, and had no extra territorial effect whatever. The growth of trade and national interdependence, however, led to the theories of comity and reciprocity above mentioned,[4] which form the basis of the mutual recognition of judgments between one state and another.[5]

917. In England a separate theory has been evolved to the effect that a foreign judgment imposes an obligation on the party against whom it has been pronounced to implement it, and this obligation and not the mere judgment itself may be made the ground of claim in an action to enforce the terms of the judgment.[6] Accordingly, in England an action to enforce may be based on the original ground of claim or on the obligation said to arise from the decree.

Subsection (2).—*Enforcement.*

918. In Scotland the only method of enforcement is an action for decree conform, in which the foreign decree must be produced and proved. A foreign decree is admissible when prepared and authen-

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[1] Secs. 137 and 144.
[2] Goudy, p. 606; see Westlake, pp. 331–332.
[3] See Jurisdiction; Bankruptcy (Scotland) Act, 1913, s. 11; Goudy, p. 115.
[4] Para. 879, *supra.*
[5] See Ersk. Inst. iv. 3, 4; *Castrique* v. *Imrie*, 1870, 30 L.J. C.P. 127, per Cockburn C.J.; *Hilton* v. *Guyot*, 1895, 159 U.S. Rep. 113.
[6] *Schibsby* v. *Westenholtz*, 1870, L.R. 6 Q.B. 155, per Lord Blackburn at p. 159; see Westlake, ss. 311, 312.

ticated according to the practice of the Court where it is granted.[1] Judgments given in British possessions are foreign judgments,[2] but decrees of English and Irish Courts are not scrutinised as if they were those of a foreign country.[3] The Judgments Extension Acts, 1868[4] and 1882,[5] provide for the Courts of each of the countries of the United Kingdom enforcing the judgments of the others summarily. A certificate of the judgment in a scheduled form is granted by the Court pronouncing it; this is registered in a book kept by the proper officer of the Court where execution is sought, and has on such registration the same force and effect as a decree of that Court. The Acts only apply to judgments for "debt, damages, or costs," *i.e.* money judgments. By the Administration of Justice Act, 1920,[6] provision is made for the reciprocal enforcement of judgments in the United Kingdom and other parts of the Empire. Like the Act of 1868, it applies only to money judgments.[7] Certain grounds are enumerated upon which a colonial judgment, which would otherwise apply, will not be registered for execution.[8]

919. It is impossible to detail here the manner in which various foreign countries treat Scottish judgments, but it may be stated generally that in most continental countries (excluding France) it is not necessary to bring a new action as here, but foreign judgments are admitted to execution after a special simplified process for that purpose.[9] The practical result is much the same everywhere.

Subsection (3).—*Real and Personal Actions.*

920. Subject to the qualifications after mentioned, a final judgment *in foro contentioso* in a foreign Court is *res judicata*,[10] A decree by a Court of competent jurisdiction purporting to dispose of proprietary or possessory rights in a *res* (*i.e.* a decree of the *forum rei sitæ*) is final and conclusive.[11] A judgment on status is assimilated to a judgment *in rem*, but in this case the jurisdiction is in the *forum domicilii*.[12] In judgments with regard to succession, jurisdiction is given by the presence of the estate within the territory or by the domicile of the deceased therein.[13] Foreign judgments *in personam* may be used (*a*) actively,

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[1] *Robertson* v. *Gordon*, 15th November 1814, F.C.; see *Disbrow* v. *Mackintosh*, 1852, 15 D. 123, per Lord Justice-Clerk at p. 124; Dickson on Evidence, s. 1319; cp. English Evidence Act, 1851, s. 7.

[2] *Attorney-General for Canada* v. *Schulze*, 1901, 9 S.L.T. 4.

[3] *Wilkie* v. *Cathcart*, 1870, 9 M. 168, per Lord Pres. Inglis at p. 171.

[4] 31 & 32 Vict. c. 54.

[5] 45 & 46 Vict. c. 31 (Inferior Courts).

[6] 10 & 11 Geo. V. c. 81, Pt. ii. ss. 9 *et seq.*

[7] Sec. 12 (1).

[8] See s. 9 (2); see Judgments Extension Acts, *infra*.

[9] Westlake, s. 313 (*a*), p. 396.

[10] Ersk. Inst. iv. 3, 4; see Westlake, s. 328; Dicey, Rule 111, p. 449.

[11] *Williams* v. *Armroyd*, quoted in 159 U.S. Rep. at p. 167, per Marshall C.J.

[12] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; *Administrator of Austrian Property* v. *von Lorang*, 1927 S.C. (H.L.) 80; cp. *Gillig* v. *Gillig*, [1906] P. 135, where a decree of divorce, although not pronounced by the Court of the domicile, was recognised on the ground that the *lex domicilii* would regard it as conclusive. See also *Schlesinger* v. *Administrator of Hungarian Property*, 1923, L.J. Newsp. p. 254.

[13] Dicey, pp. 430–432; *Orr Ewing's Trs.* v. *Orr Ewing*, 1885, 13 R. (H.L.) 1.

where the person who holds a decree (*i.e.* who is a pursuer) may seek to enforce its implement; or (*b*) passively, where the decree is held by a defender who has successfully resisted the claim in the foreign Court.[1] A pursuer who has failed abroad, however, is not barred from obtaining other relief on the same facts, or the same relief on other grounds.[2]

SUBSECTION (4).—*Objections to a Foreign Judgment used actively.*

921. A foreign judgment is presumed to have been pronounced by a competent Court and to be *res judicata*. Once it is established, the onus is on the person challenging it to aver and prove his objections to its sufficiency or to state some valid reason why it should not be enforced.[3] The number of valid objections is strictly limited.

(i) *Want of Jurisdiction.*

922. The foreign Court pronouncing the decree must have jurisdiction over the defender. The question as to what grounds of jurisdiction will be recognised by the Courts of this country is not free from difficulty and has been the subject of conflicting decisions. The claim of a foreign Court to exercise jurisdiction must be "reasonably consistent" with international law.[4] (In actions *in rem*, as above stated, the *forum rei sitæ*, and, in cases involving status, the *forum domicilii*, will have jurisdiction.) Jurisdiction is recognised in actions *in personam* where (1) the defender is at the time of the suit resident in the foreign country; (2) the defender has subjected himself to the jurisdiction by reconvention; (3) the defender has submitted to or prorogated the jurisdiction;[5] (4) possibly, even in actions *in personam*, where the defender possesses real estate within the territory;[6] (5) possibly, also, where the defender at the time of the judgment is a subject or citizen of the foreign country.[7] The leading decisions afford no general principle, and it seems that a foreign decree should be recognised and enforced internationally if the jurisdiction of the Court pronouncing it is based on the fundamental rules of effectiveness and submission.[8] If the Courts of a foreign state

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[1] Dicey, pp. 452 (Rule 114) and 460 (Rule 115).

[2] See *Callander* v. *Dittrich*, 1842, 4 M. & Gr. 68; *Hunter* v. *Stewart*, 1861, 31 L.J. (N.S.) Ch. 346. Where the Court of Session has jurisdiction over trustees and trust property it is not bound to abstain from exercising that jurisdiction merely because a decree for administration has previously been made by an English Court against the same trustees and property. *Orr Ewing's Trs., supra.*

[3] *Whitehead* v. *Thompson*, 1861, 23 D. 772.

[4] *Waygood* v. *Bennie*, 1885, 12 R. 651, per Lord M'Laren.

[5] *Schibsby* v. *Westenholtz*, 1870, L.R. 6 Q.B. 155; *Roussillon* v. *Roussillon*, 1880, 14 Ch. D. 351; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670; see *Pick* v. *Stewart, Galbraith & Co., Ltd.*, 1907, 15 S.L.T. 447; *Bank of Scotland* v. *Gudin*, 1886, 14 R. 213; see Dicey, Rule 95; Westlake, s. 326.

[6] *Roussillon*; *Sirdar Gurdyal Singh*; *Pick, supra*; but see *Emmanuel* v. *Symon*, [1908] 1 K.B. 302; Dicey, Rule 96, note (*e*).

[7] Dicey, Rule 95; *Schibsby* v. *Westenholtz, supra.*

[8] See JURISDICTION.

have jurisdiction, no inquiry will be admissible as to whether the particular tribunal chosen within that state was the appropriate one.[1]

(ii) *Want of Notice.*

923. A foreign decree may be challenged if the defender has had no reasonable notice of the dependence of a suit against him. This does not mean that the form of notice has been irregular. Such a plea is not admissible.[2] It follows that a process may be irregular by the local law, and the defender, nevertheless, duly notified of its existence; and, on the other hand, the process may be quite regular by the local law and yet the resulting decree may not be enforceable on the ground that no notice has been given, *e.g.* our system of edictal citation.[3]

(iii) *Fraud or Collusion.*

924. Fraud in the sense of misrepresentation used deliberately, inducing the foreign Court to grant the decree, is always a relevant objection to its enforcement,[4] as would also be fraud of the foreign Court itself.[5] The fraud must be a fraud upon the Court, not a fraud on the other party; and an allegation that a decree had been obtained by collusion to defeat the interests of a third party was held not to be a good ground of challenge.[6] A decree obtained by perjury could only be objected to if the perjury were the pursuer's, or committed with his connivance.

(iv) *Judgments contrary to Natural Justice or Good Morals.*

925. This is a somewhat theoretical ground of challenge, but would doubtless be recognised in a suitable case, *e.g.* where the substantive law given effect to was strongly repugnant to our ideas of natural justice, as where the foreign law was peculiar to states regarded as uncivilised or where there was something in the proceedings that rendered them grossly irregular and unfair.[7]

(v) *Finality of Foreign Judgment.*

926. The decree founded on must be a final one. No interlocutory judgment or one which can be recalled by the Court pronouncing it is

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[1] Westlake, s. 319; *Vanquelin Bouard*, 1863, 15 C.B. (N.S.) 341; Dicey, pp. 434, 435.

[2] *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; Westlake, s. 327 (*a*).

[3] *Southgate* v. *Montgomery*, 1837, 15 S. 507; *Ashbury* v. *Ellis*, [1893] A.C. 339; see *Rudd* v. *Rudd*, [1924] P. 72.

[4] *Abouloff* v. *Oppenheimer*, 1883, 10 Q.B.D. 295; *Vadala* v. *Lawes*, 1890, 25 Q.B.D. 310; contrast *Robinson* v. *Fenner*, [1913] 3 K.B. 835.

[5] Dicey, Rule 105 and p. 441, note (*q*); Piggott, Foreign Judgments, 3rd ed., p. 399.

[6] *Administrator of Austrian Property* v. *von Lorang*, 1927 S.C. (H.L.) 80.

[7] Dicey, pp. 442–445; *Det Norske Bjergnings og Dykkercompagni* v. *M'Laren*, 1885, 22 S.L.R. 861; *Don* v. *Lippmann*, 1837, 2 S. & M'L. 682, at p. 745; *Bethell* v. *Bethell*, 1888, 38 Ch. D. 220; *Roussillon* v. *Roussillon*, *supra*, per Fry L.J. Such a plea failed in *Cooney* v. *Dunne*, 1925, S.L.T. 22; *Scarpetta* v. *Lowenfeld*, 1911, 27 T.L.R. 509; and *Robinson* v. *Fenner*, *supra*.

ripe for enforcement in another country.[1] It may be subject to appeal, but if appeal is pending, safeguarding conditions may be adjected to the enforcing decree.[2] It must be presently enforceable in the foreign Court.[3] A judgment *in rem*, or an equivalent decree involving status (*e.g.* a decree of nullity of marriage), is final and conclusive, even against one not a party to the original suit, and cannot be challenged for want of finality.[4]

(vi) *Error in Fact or Law.*

927. On the theory that a foreign judgment is, subject to the qualifications above mentioned, to be treated as *res judicata*, it follows that there can be no re-trial of the case or re-examination of the merits. Some of the older Scots authorities, however, take the view that, while a foreign judgment is *res judicata* when pleaded passively, an error of the foreign Court in fact or law might be pleaded against a pursuer seeking to enforce.[5] These authorities have been doubted in Scotland,[6] and in England it has been authoritatively settled that the merits of a case could not be reopened either in fact or in law,[7] and that even when the alleged error was in the law of England.[8] It is probable that the Scots Courts would now follow the English rule. There may be an exception where both parties admit that the foreign Court has wrongly interpreted its own law.[9] It should be noted that if the law, in respect of which error is alleged, is a law foreign to both the country pronouncing judgment and the country enforcing, such law is a fact requiring proof, and any error would be an error in fact.

Subsection (5).—*Objections to a Foreign Judgment used passively.*

928. In this case the person who has successfully defended the suit in the foreign Court is using the decree in his favour as *res judicata*. A foreign decree thus pleaded in defence is generally accorded greater weight than one used actively, because the person now challenging the decree is the pursuer who originally elected to prosecute his suit in the foreign Court. He cannot therefore plead lack of jurisdiction.[10] Westlake states an opposite view, which is not considered sound.[11] A plea of want of notice does not apply. Challenge on the ground of fraud is

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[1] *Nouvion* v. *Freeman*, 1889, 15 App. Cas. 1, per Lords Herschell and Watson; *Pattison* v. *MacVicar*, 1886, 13 R., per Lord Fraser at p. 555.

[2] *Nouvion* v. *Freeman*, *supra*, per Lord Watson; *Patrick* v. *Shedden*, 1853, 2 E. & B. 14.

[3] *Delhi and London Bank* v. *Loch*, 1895, 22 R. 849.

[4] *Administrator of Austrian Property* v. *von Lorang*, 1927 S.C. (H.L.) 80.

[5] *Southgate* v. *Montgomery*, 1837, 15 S. 507; *Phosphate Sewage Co.* v. *Mollison*, 1878, 5 R., per Lord Mure at p. 1143; see *Bank of Scotland* v. *Gudin*, 1886, 14 R., per Lord M'Laren at p. 216; Bar (Gillespie's translation), *supra*, pp. 902–904.

[6] *Pattison* v. *MacVicar*, *supra*.

[7] *Henderson* v. *Henderson*, 1844, 6 A. & E. 298; *Castrique* v. *Imrie*, 1870, 4 E. & I. App. 434; *Nouvion* v. *Freeman*, *supra*, 1, per Lindley L.J. at p. 256.

[8] *Goddard* v. *Gray*, 1870, L.R. 6 Q.B. 139.

[9] *Meyer* v. *Ralli*, 1876, L.R. 1 C.P. 358.

[10] *Schibsby* v. *Westenholtz*, 1870, L.R. 6 Q.B. 155, per Lord Blackburn at p. 161.

[11] Sec. 335, p. 414.

just as applicable to a foreign judgment used passively as to one used actively, and the same may be said of the remaining grounds of objection mentioned above.[1]

Subsection (6).—*Penal and Revenue Judgments.*

929. There are two important exceptions to the general rule that a foreign judgment will, subject to the above limitations and objections, be recognised. (1) No foreign judgment will be recognised if it is penal in character. This applies, not only to prosecutions and sentences for crimes, but to all suits in favour of the state for the recovery of pecuniary penalties.[2] "The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise at the instance of the state government, or of some one representing the public, are local in this sense that they are only cognisable and punishable in the country where they were committed." [3] If civil damages are awarded in a foreign process which at the same time imposes a penalty in the public interest, the damages may be recovered in this country by enforcing that part of the decree.[4] (2) No foreign judgment which enforces the revenue laws of another state will be recognised in this country, nor can an award of costs in such an action be enforced here.[5]

Section 5.—Renvoi.

930. Renvoi (literally "sending-back") is a doctrine which is recognised in English law.[6] It is applied when there is a conflict between the rules of international law adopted by the two states concerned, *e.g.* where one refers the question to the law of the domicile and the other to the law of the nationality. There may have to be a reference back from one law to the other. Suppose a question arises in our Courts as to the testamentary capacity of a British subject domiciled abroad in a country, X, where full capacity is attained at the age of eighteen and whose international law looks to the nationality of the person concerned. Our Courts would look to the law of X (the law of the domicile). If, however, this reference was to the whole law of X, including its international law, then the question would be governed by the nationality of the person, and there would thus be renvoi or reference back to this country, where testamentary capacity is attained at twenty-one. Only one reference back is permissible. Those who

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[1] See Piggott, Foreign Judgments, 3rd ed., pp. 73 and 78, and Book III. Chapter I. pp. 337–420.

[2] *Huntington* v. *Attrill*, [1893] A.C. 150 ; 1892, 146 U.S. Rep. 657 ; Piggott on Foreign Judgments, p. 88.

[3] *Huntington* v. *Attrill, supra*, per Lord Watson at p. 156.

[4] *Raulin* v. *Fischer*, [1911] 1 K.B. 93.

[5] *The Attorney-General of Canada* v. *Schulze & Co.*, 1901, 9 S.L.T. ; see Piggott, p. 92.

[6] See Dicey, pp. 811–825.

reject the doctrine would hold that the reference to the law of X is only a reference to the local law, and testamentary capacity would accordingly be reached at eighteen. The problem has never been tackled by the Scots Courts, but, as has been stated, English authority seems to favour the doctrine.[1]

[1] *Collier* v. *Rivaz*, 1841, 2 Curtis 855 ; *Guaranty Trust Co.* v. *Hannay*, [1918] 2 K.B. 623 ; but see *In re Johnston*, [1903] 1 Ch. 821, and *In re Bowes*, 1906, 22 T.L.R. 1.

INTERPRETATION.

See STATUTE.

INTERROGATORIES.

See COMMISSION AND DILIGENCE.

INTERRUPTION.

See PRESCRIPTION.

INTIMATION.

See ASSIGNATION: PETITION.

INTIMIDATION.

See EXTORTION.

INTOXICATION.

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Section 1.—Introductory.

Subsection (1).—*Definition.*

931. There is no authoritative definition of intoxication. In the New English Dictionary the following appears *sub voce* "drunk":—"that has drunk intoxicating liquor to an extent which affects steady self-control; intoxicated, inebriated; overcome by alcoholic liquor." A Committee was appointed in 1927 by the British Medical Association to consider the subject.[1] In their opinion the word "drunk" should be taken to mean "that the person concerned was so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation in which he was engaged at the material time." Within the limited sphere of control of vehicles this may be helpful, but in general it is unsatisfactory, as a man's condition is made to depend on his occupation. Thus at one and the same moment he may be drunk if he stands, but sober if he lies down. There is only one standard of intoxication recognised by law. A man must be drunk for all purposes, or he is not drunk at all. He is not necessarily intoxicated because he is incapable through alcohol of driving a motor car with safety.[2]

Subsection (2).—*Habitual Drunkenness.*

932. As Mackenzie [3] remarks, "the law distinguisheth *inter ebrios*, who are rarely drunk, *et ebriosos*, who are habitually" so. A statutory definition of the latter class of person is given in the Habitual Drunkards Act of 1879 [4] as "a person, who not being amenable to any jurisdiction

[1] Their Report is printed in the *British Medical Journal*, 1927 (1), p. 53, and summarised in the *Glasgow Herald* of 18th February 1927, p. 9.

[2] *Presdee*, 1927, 20 C.A.R. 95. [3] Laws and Customs, i. 2, 7. [4] 42 & 43 Vict. c. 19.

in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others,[1] or incapable of managing himself or herself, or his or her affairs [2] (s. 3). The question of habitual intemperance was canvassed in the House of Lords in 1884.[3] Lord Watson said: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits,' or 'temperance,' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks, that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs, must, in my opinion, always be taken into account, because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man who would be generally regarded as of intemperate habits ought to escape from that imputation because he is no worse than his neighbours." [4] The majority of their Lordships, however, were prepared to consider the habits of the locality,[5] though otherwise they were in substantial agreement with Lord Watson.

Subsection (3).—*History and Division of Subject.*

933. In early times drunkenness was an offence penalised by a code of statutes whose enforcement was entrusted to kirk-sessions and presbyteries.[6] These were all repealed in 1906,[7] with the exception of 1579, c. 8, which strikes at "passing to tavernis" on Sundays.[8] Intoxication *per se* is thus no longer the subject of a criminal charge. It is still looked on as a moral offence, and so will justify dismissal of a servant,[9] or breach of promise of marriage,[10] and the imputation of it is slander.[11] It has effects in both civil and criminal matters, the latter of which will be best treated first. Also, there is a considerable body of statutory law for habitual drunkards who wish to subject themselves voluntarily to restraint, or are so subjected by a competent Court. Lastly, the question of how drunkenness is to be established in fact merits a separate section.

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[1] See *Isles* v. *Isles*, 1906, 14 S.L.T. 8.

[2] See *A. B.* v. *C. D.*, 1911, 1 S.L.T. 407; and *X. Y.* v. *Z. Y.*, 1911, 1 S.L.T. 459.

[3] *Standard Life Assurance Co.* v. *Wemyss*, 1884, 11 R. (H.L.) 48. [4] *Ibid.*, p. 58.

[5] Per Lord Blackburn at p. 52, and Lord Fitzgerald at p. 60.

[6] These are detailed in Hume, i. 469, and Index to Thomson's Acts of Parliament of Scotland.

[7] Statute Law Revision (Scotland) Act, 1906 (6 Edw. VII. c. 38).

[8] Acts of Parliament of Scotland, iii. 138.

[9] *Edwards* v. *Mackie*, 1848, 11 D. 67; *M'Kellar* v. *Macfarlane*, 1852, 15 D. 246; see also Fraser, Master and Servant, pp. 87–88, 353–4, 476.

[10] *Thomson* v. *Wright*, 1767, Mor. 13915.

[11] See Glegg on Reparation, pp. 149, 153, 174.

Section 2.—Effect *in criminalibus.*

Subsection (1).—*General.*

934. It may be laid down in general that drunkenness is neither in itself a crime, nor is it a defence to a criminal charge. But a condition of intoxication in a public place may be penalised if it is combined with certain *species facti*. Except in one case a man may always be as drunk as he pleases in his own house, and he cannot be convicted of any offence if he observes this limitation.[1] He must, however, avoid sleeping with an infant under three years of age, for if the child is suffocated without any internal condition to account for it any person over sixteen years of age and under the influence of drink who slept with it will be guilty of neglect under the Children Act of 1908.[2] The special offences which may be committed either at common law or under statute are detailed below. According to Hume [3] there are some exceptional crimes, such as blasphemy and sedition, in which intoxication should be regarded as a defence. The general rules in this matter are explained elsewhere.[4] Drunkenness, short of insanity, can never absolve, but if it is so extreme as to destroy intention it may reduce murder to culpable homicide. A man cannot be sentenced unless he is sober.[5] It has been said in England [6] that "an admission made by a man when drunk may not be as weighty as if he was sober, but it is some corroboration."

Subsection (2).—*Offence at Common Law.*

935. It is contempt of Court if any person comes before a judge inebriated, whether he be pannel,[7] juryman,[8] or witness.[9] Imprisonment or fine may be imposed. Also drunkenness while in control of any apparatus liable to endanger public safety is criminal negligence, and will ground a charge of culpable homicide should anyone be killed in consequence. The commonest cases are in connection with vehicles [10] and firearms.[11]

Subsection (3).—*Offence under Statute.*

936. Various statutory offences have been created from time to time, of which the following are the principal. Drunkenness is an offence when it is found in a public place [12] in conjunction with any of these aggravations: (*a*) being incapable of taking care of one's self, and without a suitable caretaker;[13] (*b*) being in charge of any "carriage,[14]

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[1] *Lester* v. *Torren*, 1877, 2 Q.B.D. 403.
[2] 8 Edw. VII. c. 67, s. 13.
[3] Hume, i. 45; ii. 570.
[4] See Crime, Vol. V, p. 60, *ante*.
[5] *Maccullin*, 1797, Hume, ii. 471.
[6] *Hedges*, 1909, 3 C.A.R. 262, at p. 265.
[7] *M'Lean*, 1838, 11 Swin. 185.
[8] *Yates*, 1847, Ark. 238; *Wilson* v. *John Angus & Sons*, 1921, 2 S.L.T. 135.
[9] *Wemyss*, 1840, Bell's Notes, 165.
[10] *Liddell*, 1818, Alison, i. 117.
[11] *Scott*, 1830, Alison, i. 115.
[12] Defined in Licensing Act, *infra*, s. 70 (5) and (6).
[13] Licensing (Scotland) Act, 1903, s. 70 (1); formerly Burgh Police Act, 1892, s. 381 (24).
[14] Burgh Police Act, s. 4 (5), adopted by Licensing Act, s. 70 (5).

horse, cattle, or steam engine";[1] (*c*) being in possession of loaded firearms; (*d*) being in charge of a child under seven;[2] (*e*) disorderly behaviour or indecent language[3] to the annoyance of some person;[4] (*f*), being in a shebeen;[5] (*g*) attempting to enter a public house;[6] (*h*) working in connection with a railway,[7] or (*i*) a stage carriage;[8] (*j*) being a member of a ship's complement and endangering the safety of the ship;[9] or (*k*) attempting to enter or refusing to leave a vessel contrary to orders.[10] Imprisonment can only be inflicted in the cases of (*e*), (*h*), and (*j*). In the other cases the maximum penalty is a fine of forty shillings, except in (*f*) and (*i*), where it is ten shillings and £5 respectively. It should be noted that being drunk in charge of a motor-car is not severely penalised. Even when it can be prosecuted as dangerous driving the limit is £20.[11] In England a special statutory provision has enabled both imprisonment and substantial fine to be imposed.[12] Lastly, (*l*) it is an offence for a publican to be drunk in his own licensed premises[13] when they are open to the public.[14]

Subsection (4).—*Intoxication of Others.*

937. There are certain further offences which may be committed by encouraging drunkenness in others. At common law it is culpable homicide to supply a child with intoxicating liquor to such excess that it dies in consequence.[15] Under the Licensing Acts there are penalties for procuring more liquor for a person already the worse of it,[16] and in the case of a publican for supplying such a person,[17] and for knowingly permitting drunkenness.[18] In the last case the onus is on the accused to shew that he took all reasonable steps to prevent it.[19] It should also be mentioned that it is an offence to sell firearms, etc., to or repair them for any person whom there is reasonable ground for believing to be

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[1] Licensing Act, s. 70 (1); formerly Burgh Police Act, s. 380 (11).
[2] Licensing Act, s. 70 (2).
[3] *Ibid.*, s. 70 (1). It seems that this was not an offence at common law; see Hume, i. 46, 570; Alison, i. 663.
[4] *Rowland* v. *Deas*, 1906, 8 F. (J.) 86, 5 Adam 89. [5] Licensing Act, s. 74.
[6] Temperance (Scotland) Act, 1913 (3 & 4 Geo. V. c. 33), s. 13 (1).
[7] Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), ss. 17–18, amending 3 & 4 Vict. c. 97, s. 13.
[8] Stage Carriage Act, 1832 (2 & 3 Will. IV. c. 120), s. 48.
[9] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 220; see also Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), s. 46.
[10] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 287.
[11] Motor Car Act, 1903 (3 Edw. VII. c. 36), ss. 1 and 11.
[12] 15 & 16 Geo. V. c. 86, s. 40 (1); see *Presdee*, 1927, 20 C.A.R. 95.
[13] Licensing Act, s. 53, and Sched. VI.
[14] *Lester* v. *Torren*, 1877, 2 Q.B.D. 403; *Warden* v. *Tye*, 1877, 2 C.P.D. 74.
[15] *Philip*, 1818, Hume, i. 237, note; Alison, i. 99; see Macdonald, 134.
[16] 1903 Act, s. 74.
[17] *Ibid.*, s. 53, and Sched. VI.; see *Linton* v. *Stirling*, 1893, 20 R. (J.) 75.
[18] 1903 Act, s. 53, and Sched. VI.
[19] 1903 Act, s. 98; see *Kessack* v. *Smith*, 1905, 7 F. (J.) 75; *Soutar* v. *Auchinachie*, 1909 S.C. (J.) 16; *Campbell* v. *Cameron*, 1916 S.C. (J.) 1.

drunk,[1] and for a pawnbroker to accept any article from one appearing to be so.[2]

Section 3.—Effect *in civilibus.*

Subsection (1).—*General.*

938. In civil matters a man's rights may be affected in several respects by his drunkenness. In general his capacity to contract may be impaired, but his liability for delict can never be reduced. As between master and servant intoxication will as a rule take the servant out of the scope of his employment,[3] and it amounts to serious and wilful misconduct.[4] As between husband and wife habitual drunkenness is a ground for judicial separation,[5] as it is declared by statute [6] to be equivalent to cruelty, of which it was already an element at common law.[7]

Subsection (2).—*Contract.*

939. A man cannot validly contract if he has lost the use of his reason through drunkenness.[8] One would naturally suppose such an agreement to be absolutely void, but it seems only to be voidable.[9] The inebriate may be barred from challenging the transaction if he does not immediately repudiate it on coming to his senses.[10] Anything short of loss of reason is insufficient to enable him to escape. The same rules apply to marriage.[11] But although the parties knew to some extent what they were doing, the fact of their intoxication may be founded upon to shew that there was no serious intention to be bound.[12] Thus also a contract may be avoided. Further, even where a person was only partially incapacitated by drink, this will have an important effect if there is any question of circumvention. The Court is always more ready to reduce a deed on that ground if the grantor was intoxicated.[13] Where drink was supplied to him by the other party to an unusual extent there is a strong case for avoiding the contract.[14]

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[1] Firearms Act, 1920 (10 & 11 Geo. V. c. 43), s. 4.

[2] Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32.

[3] *Renfrew* v. *R. & J. M'Crae, Ltd.*, 1914 S.C. 539; cp. *Fraser* v. *Riddell & Co.*, 1914 S.C. 125; see also para. 933, *supra.*

[4] *M'Groarty* v. *John Brown & Co., Ltd.*, 1906, 8 F. 809.

[5] *Isles* v. *Isles*, 1906, 14 S.L.T. 118; *A. B.* v. *C. D.*, 1911, 1 S.L.T. 407; *X. Y.* v. *Z. Y.*, 1911, 1 S.L.T. 459.

[6] Licensing Act, 1903, s. 73.

[7] *M'Gaan* v. *M'Gaan*, 1880, 8 R. 279.

[8] *Lord Haltoun* v. *Earl of Northesk*, 1672, Mor. 13, 384; Stair, i. 10, 13; Ersk. iii. 1, 18; *Duncan* v. *Martin*, 1839, Macfar. 270; *Johnston* v. *Clark*, 1854, 17 D. 228; *Taylor* v. *Provan*, 1864, 2 M. 1226.

[9] *Wilson & Fraser* v. *Nisbet*, 1736, Mor. 1509; see also *Mathews* v. *Baxter*, 1873, L.R. 8 Ex. 132.

[10] *Pollok* v. *Burns*, 1875, 2 R. 497.

[11] *Johnston* v. *Brown*, 1823, 2 S. 495.

[12] *Jardine* v. *Elliot*, 1803, Hume, 684; *Hunter* v. *Stevenson*, 1804, Hume, 686; cp. *Taylor, supra.*

[13] *M'Kie* v. *Maxwell*, 1752, Mor. 4963; *Jackson* v. *Pollok*, 1900, 8 S.L.T. 267; *Harvey* v. *Smith*, 1904, 6 F. 511.

[14] *A.* v. *B.*, 1682, Harc. No. 173, Mor. Supp. vol. 37; cp. *Gardner* v. *Thomart*, 1677, 3 Bro. Supp. 162.

To induce a person to become drunk with the deliberate intention of taking advantage of him is fraud,[1] which, of course, is a good reason for reduction. Contracts of insurance against death [2] or accident [3] commonly contain special clauses as to intoxication, but no general rules can be laid down as applicable to them.

Subsection (3).—*Delict.*

940. It cannot be laid down as a general rule that drunkenness is negligence, but in many cases it is so, as for instance when driving a vehicle [4] or engaging in work which may involve danger to the public.[5] An employer is liable for accidents caused by the intoxication of his servants.[6] A drunk person may be disqualified from recovering damages on the ground that his own condition contributed to his injury.[7] On the other hand, if there is failure in a duty owed to the public the party at fault cannot avoid liability by shewing that the particular member who was hurt was incapacitated by alcohol.[8] There is no duty in law to assist an inebriate to a place of safety.[9]

Section 4.—Inebriates Acts.

941. Since 1879 there has been a special code of statutes for the benefit of habitual drunkards who either wish to subject themselves to treatment or who are so subjected by a competent Court. The principal Acts involved are as follows: The Habitual Drunkards Act, 1879;[10] The Inebriates Act, 1888;[11] The Inebriates Act, 1898;[12] The Inebriates Act, 1899;[13] The Inebriates Amendment (Scotland) Act, 1900.[14] The Acts of 1899 and 1900 do not call for special notice. The first two are cited as "The Inebriates Acts, 1879 and 1888." A definition of a "habitual drunkard" is contained in s. 3 of the 1879 Act, and is quoted above.[15] These provisions are concerned in the main with (1) voluntary retreats, and (2) compulsory inebriate reformatories.

Subsection (1).—*Retreats.*

942. By s. 3 of the 1879 Act a retreat is defined as "a house licensed . . . . for the reception, control, care, and curative treatment of

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[1] *Couston* v. *Miller*, 1862, 24 D. 607.
[2] See *Standard Life Assurance Co.* v. *Wemyss*, 1884, 11 R. (H.L.) 48; *Macrobbie* v. *The Accident Insurance Co.*, 1886, 23 S.L.R. 391.
[3] See *Robertson* v. *London Guarantee and Accident Co., Ltd.*, 1915, 1 S.L.T. 195.
[4] *Donald* v. *Brand*, 1862, 24 D. 295.
[5] *MacTernan* v. *White*, 1890, 17 R. 368; *Gunn* v. *Gardiner*, 1820, 2 Mur. 194.
[6] *Donald, MacTernan & Gunn, supra.*
[7] Per Lord Justice-Clerk Hope in *Hislop* v. *Durham*, 1842, 4 D. 1168, at p. 1170; *Sinnerton* v. *Merry & Co.*, 1886, 13 R. 1012.
[8] Per Lord Cockburn in *Neilson* v. *Rodger*, 1854, 16 D. 603.
[9] *MacCormick* v. *Caledonian Rly. Co.*, 1904, 6 F. 362.
[10] 42 & 43 Vict. c. 19.
[11] 51 & 52 Vict. c. 19.
[12] 61 & 62 Vict. c. 60.
[13] 62 & 63 Vict. c. 35.
[14] 63 & 64 Vict. c. 28.
[15] See para. 932, *supra.*

habitual drunkards." By s. 6 the local authority—that is, the county or town council [1]—may, subject to any conditions which such local authority shall deem fit, grant to any person or to two or more persons jointly, a licence for any period not exceeding two years,[2] to keep a retreat, and may from time to time revoke or renew such licence. The application for such licence, and the licence itself, shall be in the forms referred to below.[3] One at least of the persons to whom a licence is granted shall reside in the retreat and be responsible for its management. A duly qualified medical man shall be employed as medical attendant.[4] No licence shall be granted to any person who keeps a house for reception of lunatics.[5]

943. Any habitual drunkard desirous of being admitted into a retreat may make application to the licensee of a retreat in the form referred to below.[6] Such application shall state the time, not exceeding two years,[7] during which the applicant undertakes to remain in the retreat, and shall be accompanied by the statutory declaration of two persons to the effect that the applicant is a habitual drunkard within the meaning of the Act. The signature of the applicant shall be attested by any justice of the peace,[8] and such justice must satisfy himself that the applicant is a habitual drunkard within the meaning of the Act, and must explain to him the effect of his application for admission into a retreat and his reception therein, and such justice shall state in writing and as a part of such attestation that the applicant understood the effect of his application for admission and his reception into the retreat. Such applicant, after his admission into the retreat, unless discharged or authorised by licence as hereinafter provided, shall not be entitled to leave such retreat till the expiration of the term mentioned in his application, and he may be detained therein till such expiration.[9] He may afterwards be readmitted or have his term of detention extended without the said statutory declaration and without the attesting justice having to satisfy himself that he is a habitual drunkard.[10] Every licensee of a retreat must, within two days of the reception of any person under this Act, send a copy of the application for admission to the clerk of the local authority and to the Secretary of State for Scotland.[11] Any person may at any time be discharged by the order of a justice upon the request in writing of the licensee of the retreat, if it shall appear to such justice reasonable and proper.[12]

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[1] 1898 Act, s. 13, and Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 30), s. 11 (5).

[2] 1898 Act, s. 15.

[3] *Ibid.*, s. 20; S.R. & O. Rev., 1904, vi., *s.v.* "Inebriate," p. 13, Rule 1 and Forms I. and II.

[4] 1879 Act, s. 6; S.R. & O., *supra*, Rule 4.

[5] 1879 Act, s. 7.

[6] *Ibid.*, s. 10; 1898 Act, s. 20; S.R. & O., *supra*, Forms III. and IV.

[7] 1898 Act, s. 16.

[8] 1888 Act, s. 4; 1898 Act, s. 16; see S.R. & O., *supra*, Form VI.

[9] 1879 Act, s. 10.

[10] 1898 Act, s. 17; see S.R. & O., *supra*, Form V.

[11] 1879 Act, s. 11; see S.R. & O., *supra*, Rule 7.

[12] 1879 Act, s. 12; see S.R. & O., *supra*, Rule 6 and Form VII.

944. The Secretary of State for Scotland may appoint an "inspector of retreats," and assistants to him. Every licence is liable to a stamp duty of £5. Every retreat is to be inspected [1] at least twice a year, and any person may be ordered to be discharged by the Secretary of State. The inspector of retreats shall present an annual report to the Secretary of State, which shall be laid before Parliament. The Secretary of State may make rules for the management of a retreat.[2] A Sheriff within whose district the retreat is situated may at any time, by order under his hand, authorise any person to visit and examine a person detained in a retreat, and to inquire into and report on any matters which he may think fit in relation to the person so detained, and on receiving such report he may order the discharge of the person so detained.[3]

945. A justice of the peace, at the request of a licensee of a retreat, may permit a habitual drunkard detained in such retreat to live with any trustworthy person named in the licence willing to receive and take charge of him for a definite time for the benefit of his health. If he escapes from the charge of that person, or refuses to be restrained from drinking, he may be taken back to the retreat. Any such licence to live out of the retreat may be revoked by the Secretary of State, or by the justice of the peace by whom it was granted.[4]

946. If any licensee of a retreat fails to comply with the provisions of the Act, or permits an inmate of the retreat to be neglected, he may be fined or imprisoned. If any person ill-treats or neglects, or assists to escape, an inmate of the retreat, he may be fined or imprisoned. If any person without the authority of the licensee, or of the medical officer of the retreat, brings into any retreat, or without the authority of such medical officer, except in case of urgent necessity, gives to any person detained therein, any intoxicating liquor or sedative narcotic, or stimulant, drug, or preparation, he may be fined or imprisoned.[5] If a habitual drunkard in a retreat refuses to conform to the rules, he may, on summary conviction, be fined or imprisoned, and after imprisonment be brought back to the retreat to finish his period of detention. If he escapes,[6] a warrant may be issued for his apprehension, and he may be remitted by a justice or magistrate to the retreat from which he has escaped.[7]

947. In the event of the death of a person detained in a retreat, a statement is to be drawn up by the medical attendant and sent to the fiscal, the registrar of the district, the clerk of the local authority, and the person by whom the last payment was made for the deceased.[8] Any action against any person for anything done in pursuance of the

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[1] See S.R. & O., *infra*, Rule 8.
[2] 1879 Act, ss. 13–17; S.R. & O. Rev., 1904, vi., *s.v.* "Inebriate," p. 13.
[3] 1879 Act, ss. 18, 35 (4).
[4] *Ibid.*, ss. 19–22; see S.R. & O., *supra*, Form VIII.
[5] 1879 Act, ss. 23, 24, 28; see S.R. & O. Rev., 1904, vi., *s.v.* "Inebriate," p. 13, Rules 15–17.
[6] See S.R. & O., *supra*, Rule 6.
[7] 1879 Act, ss. 25, 26; 1898 Act, s. 28.
[8] 1879 Act, s. 27; 1898 Act, s. 25 (*g*); see S.R. & O., *supra*, Rule 6.

Act shall be commenced within two years after the thing done, and notice shall be given to the defender one month at least before the commencement of the action.[1] But by the Public Authorities Protection Act, 1893,[2] any such action must be raised within six months. A county council or town council may contribute to the establishment or maintenance of a retreat.[3]

Subsection (2).—*Inebriate Reformatories.*

948. Under the Act of 1898 provision is made for inebriate reformatories of two kinds—(*a*) State, and (*b*) certified. As to the former, the Secretary of State for Scotland may establish them, the expense to be paid out of moneys provided by Parliament. He may make regulations for the management of any such reformatory, and the Prisons (Scotland) Act, 1877, and the rules thereunder shall apply as if the reformatory were a prison. But no regulation shall authorise the infliction of corporal punishment.[4] The Secretary of State may also, on the application of a county or town council, or of any person desirous of establishing an inebriate reformatory, certify it as an inebriate reformatory. He may make regulations [5] as to the management of any such reformatory, and may thereby impose a fine or imprisonment for the breach of any such regulations,[6] which may be prosecuted summarily.[7] The Secretary of State may appoint inspectors of certified inebriate reformatories,[8] and the Treasury may contribute to the expenses of the detention of persons in such reformatories. County or town councils may contribute to the establishment of such reformatories, and may defray the whole or any part of the expenses of persons detained therein.[9]

949. If any person escapes from a certified inebriate reformatory, or from the charge of any person in whose charge he is placed under licence, he may be apprehended without warrant and brought back. If any person detained in a State or certified inebriate reformatory has any real or personal property more than sufficient to maintain his family, the Sheriff may make an order for payment of the expenses incurred in relation to his detention.[10]

950. The provisions under which persons may be confined in these reformatories are ss. 23 and 24 of the Act of 1898. The former enacts that: "Where in Scotland a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is, or is found by the jury

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[1] 1879 Act, s. 31. [2] 56 & 57 Vict. c. 61. [3] 1898 Act, s. 14.

[4] *Ibid.*, ss. 3, 4, and 25; for rules see S.R. & O. Rev., 1904, vi., *s.v.* "Inebriate," p. 53; 1906 (No. 542), p. 295; 1917 (No. 842), p. 926.

[5] See S.R. & O., 1912, p. 1454; 1906 (No. 542), p. 295.

[6] 1898 Act, ss. 5 and 6. [7] 1899 Act, s. 2.

[8] 1898 Act, s. 7; for rules see S.R. & O. Rev., 1904, p. 53, Rules 10–40.

[9] 1898 Act, ss. 8–9; 1900 Act, s. 1. [10] 1898 Act, ss. 11 and 12.

to be, a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years in any State inebriate reformatory, or in any certified inebriate reformatory, the managers of which are willing to receive him." [1] The prescribed procedure is very similar to that followed in the case of the aggravation of habitual criminality. All three constituents of the charge should be libelled, and if so a plea of guilty will be accepted in practice by the Crown as obviating the necessity of the Court determining that the crime was influenced by drunkenness. This section was formerly in frequent use in the Sheriff Court in cases of child neglect under the Children Act, 1908.[2] It has not been much in evidence of recent years. There seems no reason why the plea of habitual drunkenness should not be advanced as a special defence with a view to avoiding imprisonment by substituting confinement in a reformatory. The next section provides that: "Any person who in Scotland commits any of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, may be tried on indictment before the High Court of Justiciary, or the Sheriff with a jury, or, with his own consent, by the Sheriff summarily, and shall be liable on conviction to be detained for a term not exceeding three years in any certified inebriate reformatory, the managers of which are willing to receive him." [3]

951. The first schedule to the Act enumerates sections of certain Acts which make drunkenness an offence in certain circumstances and places, *e.g.* the Merchant Shipping Act, 1894,[4] s. 287, the Public Houses Amendment (Scotland) Act, 1862,[5] ss. 19, 23, and the Burgh Police (Scotland) Act, 1892,[6] ss. 380, 381. By s. 70 of the Licensing (Scotland) Act, 1903,[7] an offence under that section, *e.g.* being drunk in certain places and in certain circumstances, shall be deemed to be an offence mentioned in the first schedule to the Inebriates Act, 1898. It is to be observed that a person convicted under s. 24 of the Act of 1898 may apparently be sent to a certified, but not to a State, inebriate reformatory. Any of the offences mentioned in the first schedule to the Act may apparently be charged in the indictment with the aggravation of three previous summary convictions within twelve months, and of being a habitual drunkard within the meaning of s. 3 of the Act of 1879. This will have to be proved in the ordinary way. The sentence of detention in a certified inebriate reformatory appears to be in substitution of any other mode of punishment.

952. The person vested with the title to any available poorhouse may, with consent of the Secretary of State for Scotland, give, subject to

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[1] 1898 Act, s. 23.
[2] 8 Edw. VII. c. 67, particularly s. 12.
[3] 1898 Act, s. 24.
[4] 57 & 58 Vict. c. 60.
[5] 26 & 27 Vict. c. 35.
[6] 55 & 56 Vict. c. 55, but see 12th Sched. Part II. of Licensing Act, 1903.
[7] 3 Edw. VII. c. 25.

conditions, the use of the whole or any part thereof for the purposes of an inebriate reformatory. It is provided that "in any computation of time for the purpose of ascertaining the settlement of any pauper, the time during which he has been detained in an inebriate reformatory shall be reckoned as time spent by him as a prisoner." This provision is of little value, for the question of what effect residence in prison may have upon the acquisition or loss of a settlement is not regulated by statute. It has, however, been held that a man in prison may lose his settlement by absence.[1] In practice, unless in serious cases, persons under sentence of detention in reformatories are not arrested and tried for other offences.

Subsection (3).—*General.*

953. It is to be observed that "retreats" (established under the Act of 1879) are entirely different from "inebriate reformatories" (established under the Act of 1898). In the case of the former, patients are admitted on their own application, though after admission they can be forcibly detained. In the case of the latter, patients are sent there on conviction of certain offences. Retreats are established by private persons, though licensed by local authorities. They receive no assistance from the Treasury, and though local authorities are entitled to contribute to the expense,[2] they have not yet done so. The result is that they are of no use to the poorer classes. Dr. Dunlop, inspector under the Acts, in his annual report to the Secretary for Scotland for 1909,[3] after stating that there are only three licensed retreats in Scotland, says, "All three are conducted by private enterprise, and all three are designed to meet the requirements of the upper and middle classes. . . . There is still in Scotland no licensed retreat accommodation adapted to the requirements of the labouring and artisan classes, as the fees necessarily charged in the three existing retreats are more than members of these classes can afford. So far in Scotland no county council or town council has seen fit to exercise the power given by the 1898 Act of contributing towards the expenses of retreats, and thus making provision for the less well-to-do classes." These retreats also receive as private patients persons who have not signed an application under the Act, and who therefore cannot be forcibly detained.

954. Inebriate reformatories, on the other hand, are of two kinds: (1) established by the State, the State paying all expenses; and (2) certified inebriate reformatories, established either by county or town councils or by private persons, which reformatories receive grants from the Treasury on account of persons detained therein, and may also receive grants from the county or town council.[4] According to the said Report for 1909 there were then four certified and one State inebriate reformatories in Scotland.

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[1] *Leith Parish Council* v. *Aberdeen Parish Council*, 1910, S.C. 404.
[2] 1898 Act, s. 14. [3] Cd. 5364. [4] 1898 Act, ss. 8, 9.

Section 5.—Other Statutory Provisions.

955. The Licensing (Scotland) Act, 1903,[1] provides that "where a person is convicted of any offence mentioned in the first schedule to the Inebriates Act, 1898, the Court may, either in addition to, or in substitution for, any other penalty, order the defender to find caution for good behaviour for any period not exceeding six months, and under a penalty not exceeding twenty pounds, and, in default of such caution being found, to be imprisoned for a period not exceeding thirty days." [2]

956. Where any person is convicted of any offence mentioned in the first schedule to the Inebriates Act, 1898, and, within the twelve months preceding the date of such conviction, has been convicted at least three other times of any offence so mentioned, the Court may order that notice of the conviction, with such particulars as may be prescribed by the Secretary of State for Scotland, be sent to the police authority (within the meaning of the Police (Scotland) Act, 1890), for the police area in which the Court is situate. Where a Court in pursuance of this Act orders notice of a conviction to be sent to a police authority, the Court shall inform the convicted person that the notice is to be so sent; and (*a*) if the convicted person, within three years after the date of the conviction, purchases or obtains, or attempts to purchase or obtain, any exciseable liquor at any premises licensed for the sale of exciseable liquor by retail, or at the premises of any club registered in pursuance of the provisions of this Act, he shall be liable, on summary conviction, to a fine not exceeding, for the first offence, twenty shillings, and for any subsequent offence, forty shillings; and (*b*) if any person holding a certificate for the sale of exciseable liquors by retail, whether for consumption on or off the premises, or any person selling, supplying, or distributing exciseable liquor, or authorising such sale, supply, or distribution, on the premises of a club registered in conformity with the provisions of this Act, within that period knowingly sells, supplies, or distributes, or allows any person to sell, supply, or distribute, exciseable liquor to, or for the consumption of, any such person, he shall be liable, on summary conviction, for the first offence to a fine not exceeding ten pounds, and, for any subsequent offence in respect of the same person, to a fine not exceeding twenty pounds. Regulations shall be made by the police authority for the purpose of securing the giving of information to licensed persons and secretaries of clubs, registered under this Act, of orders made under this section, and for assisting in the identification of the convicted persons." [3] Conviction under the 1898 Act may entail certain disqualifications as to Old Age Pension.[4]

957. By s. 26 of the Children Act, 1908,[5] it is provided that if a person is convicted of cruelty or of any of the offences mentioned in the first schedule to the Act (that is, offences under the Criminal Law Amend-

[1] 3 Edw. VII. c. 25. [2] *Ibid.*, s. 71. [3] *Ibid.*, s. 72.
[4] See Old Age Pensions Acts, 1908 (8 Edw. VII. c. 40), s. 3 (3), and 1911 (1 & 2 Geo. V. c. 16), s. 4. [5] 8 Edw. VII. c. 67.

ment Act, 1885,[1] the Dangerous Performances Acts, 1879[2] and 1897,[3] and any offence involving bodily injury to a child or young person), and if it appears to the Court that that person is a parent of, or is living with the parent of, the child or young person in respect of whom the offence was committed, and is a habitual drunkard within the meaning of the Inebriates Acts, the Court in lieu of sentencing him to imprisonment, may make an order for his detention in a retreat for any period not exceeding two years, but such order shall not be made unless (*a*) the person having had due notice consents to it, (*b*) the spouse of such person is heard, if desired, in objection to such order, (*c*) the Court is satisfied that provision will be made for the expenses of such person in the retreat. The offences referred to in this section are rarely committed by those who are able to pay for themselves in a retreat, and therefore the provision is of little use.

Section 6.—Evidence of Drunkenness.

958. Unfortunately the only scientific attempt to formulate reliable tests for intoxication was made by a body of medical men, who set out with a limited object, and coined the limited definition quoted above.[4] But their conclusions apply *a fortiori* to the absolute standard of the law. According to their report[5] there are three subjects of inquiry: (*a*) recent consumption of alcohol; (*b*) present loss of control; and (*c*) absence of any independent pathological condition. Before a man can be certified as drunk, these three facts must be established, and he should be examined by a doctor to that end within half an hour. It should be noted in passing that, as a matter of law, if he is not drunk but ill and dies in consequence of being refused medical aid, the police will be personally liable in damages.[6]

959. The only test suggested by the doctors for (*a*) is smell. With regard to (*b*) there is, of course, no single test which is conclusive. Not only so, but in order to be definitely certain there must be a combination of most of six sets of symptoms relating to tongue, behaviour and clothing, pupils, memory, speech, and tremors. Failing this, a relatively correct conclusion may be formed from a combination of several of these considerations, adding to their number movement and breathing. Little attention should be paid to certain common police tests, taken by themselves, such as repetition of phrases, character of writing, and walking on a straight line. Lastly, (*c*) it should be noted that "there is no single symptom due to consumption of alcoholic liquor which may not also be a sign of some other pathological condition." Further, all the symptoms of drunkenness may be produced by any of a large number of conditions, including head injury, drugs, extremes of temperature, excessive loss of blood, and sudden nervous shock. There is a decision of the House of Lords as to what is sufficient evidence of habitual intemperance.[7]

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[1] 48 & 49 Vict. c. 69. [2] 42 & 43 Vict. c. 34. [3] 60 & 61 Vict. c. 52.
[4] See para. 931, *supra*. [5] See above, para. 931, note 1, for reference.
[6] *Simpson* v. *Mags. of Dundee*, 1928, S.N. 30.
[7] *Standard Life Assurance Co.* v. *Wemyss*, 1884, 11 R. (H.L.) 48.

INTRINSIC.

See OATH ON REFERENCE.

INVECTA ET ILLATA.

See HYPOTHEC.

INVENTORY.

See CONFIRMATION OF EXECUTORS; EXECUTORS; JUDICIAL FACTOR; PRACTICE AND PROCEDURE.

INVENTORY DUTY.

See ESTATE AND OTHER DEATH DUTIES.

INVESTITURE.

See COMPLETION OF TITLE; SUPERIOR AND VASSAL.

INVOICE.

See SALE.

I.O.U.

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Section 1.—Form of Document.

960. The requisites of an I.O.U. are: (1) it must be holograph of the granter;[1] (2) it must contain the words or letters "I owe you" or "I.O.U."; (3) the amount due must be stated, and (4) it must be signed by the granter. It need not be addressed to a specified person. If a wrong date of issue is inserted this of itself will not invalidate the document.[2] An I.O.U. is usually expressed in the following or like terms:—

Edinburgh, 1*st May* 1929.

To John Smith.

I.O.U. £20.

Peter Jones.

Section 2.—Effect of Document.

961. As its phraseology expresses, an I.O.U. is an admission of indebtedness, and it implies a promise or obligation to pay.[3] Unless its genuineness is disputed it is a good writ with which to instruct a loan.[4] A person in possession of the document is presumed to be entitled to enforce the obligation therein contained.[5] In the ordinary case an I.O.U. will warrant a decree against the granter, unless he can prove by writ or oath that the debt has been paid or compensated. But the mere granting of an I.O.U., like the acceptance of a bill of exchange, does not preclude the named debtor from shewing that there was no consideration.[6]

962. An I.O.U. does not express the ground of debt or give any indication of the kind of contract out of which the debt has arisen. It

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[1] *Haldane* v. *Speirs*, 1872, 10 M. 537, per Lord Pres. Inglis at p. 541.

[2] *Williamson* v. *Allan*, 1882, 9 R. 859.

[3] *Allan* v. *Murray*, 1837, 15 S. 1130.

[4] *Williamson* v. *Allan*, *supra*, per Lord Pres. Inglis at p. 864.

[5] *Brunton* v. *Bone*, 1859, 1 S.L.J. 58; *Fereneze Spinning Co.* v. *Wallace* 1859, 1 S.L.J. 93; *Curtis* v. *Rickards*, 1840, 1 Man. & G. 46.

[6] *Hinton* v. *Sparkes*, 1868, L.R. 3 C.P. 161, per Bovill C.J. at p. 164. See also *M'Creadie's Trs.* v. *M'Creadie*, 1897, 5 S.L.T. 153.

does not therefore follow that it has been granted for a loan or in respect of any particular kind of contract or that to get rid of it the granter must prove payment of money. The granter accordingly always has the right to demand its restitution upon satisfaction of the obligation, whatever it may have been, in respect of which it was granted. The question whether in any case it is necessary to prove payment cannot be solved by anything which appears on the face of the I.O.U., but depends entirely upon the circumstances under which it was granted and the intention with which it was given by the one party to the other. It is competent to prove by parole evidence facts and circumstances from which it may be inferred that the obligation in an I.O.U. has been discharged and that it is no longer a living document of debt in the hands of the holder.[1]

963. A holograph acknowledgment by a bankrupt granted after the date of sequestration for loans made prior thereto is not admissible to vouch a claim for the money advanced.[2] In a Sheriff Court case I.O.U.'s granted after the bankrupt had executed a trust-deed for money lent were held as sufficient grounds for parole evidence to constitute the lender's claim in the insolvency.[3]

Section 3.—Stamp.

964. An I.O.U. requires no stamp, for it is not a receipt, nor is it a bond, since it need contain no word of obligation. It is neither a promissory note nor a bill of exchange, since it contains neither an express promise to pay nor a fixed date of payment. If the words of the document be such as to make it not a promissory note but an agreement it must be stamped accordingly, unless it be under £5 in amount.[4] A writing in the following terms:—"Berwick, *March* 16, 1841.—Received of Mrs. —— the sum of £170, for which I promise to pay her at the rate of five per cent. from the above date," was found not liable to stamp duty.[5] An instrument in the following terms was held to be a promissory note:—"I.O.U. £20, to be paid on the 22nd inst."[6] But the addition of the words to an ordinary I.O.U. "for value received" does not constitute the document a promissory note.[7]

Section 4.—Negotiability.

965. An I.O.U. is not a negotiable document in the sense that it may be transferred by mere endorsation and delivery. It may, how-

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[1] *Bishop* v. *Bryce*, 1910 S.C. 426, commenting on *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764; see also *Bryan* v. *Butters Bros. & Co.*, 1892, 19 R. 490.
[2] *Carmichael's Trs.* v. *Carmichael*, 1929, S.L.T. 230.
[3] *Florence* v. *Landery*, 1917, 33 S.L. Rev. 286.
[4] Stamp Act, 1891 (55 & 56 Vict. c. 39).
[5] *Taylor* v. *Steele*, 1848, 11 Jur. 806.
[6] *Brooks* v. *Elkins*, 1836, 6 L.J. Exch. 6.
[7] *Gould* v. *Coombs*, 1845, 1 C.B. 543, 14 L.J. C.P. 175.

ever, be assigned and the assignee may enforce the obligation. It has been held that an I.O.U. will not pass under a testamentary bequest of "securities for money." [1]

Section 5.—Enforcement.

966. An action cannot competently be laid upon an I.O.U. as a document of debt. The proper course is to sue the debtor for the amount, using the I.O.U. as evidence of the amount due.[2]

Section 6.—Prescription.

967. An I.O.U. is not a document which falls under the vicennial prescription introduced by the Statute 1669, c. 9.[3]

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[1] *Barry* v. *Harding*, 1844, 1 Jo. & Lat. 475, per Sugden L.C.; cf. *Hopkins* v. *Abbott*, 1875, L.R. 19 Eq. 222, at p. 228.

[2] *Neilson's Tr.* v. *Neilson's Trs.*, 1883, 11 R. 119.

[3] *Craig* v. *Monteith's Exrx.*, 1925, S.L.T. 282; see decision *contra*, *MacAdam* v. *Findlay*, 1911 S.C. 1366.

IRRITANCIES.

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Section 1.—Introduction.

968. An irritancy is the forfeiture or determination of a right consequent upon an omission to comply with, or an act done in contravention of, the express or implied conditions upon which the particular right is held. Although irritancies have in certain cases been associated with feudal conveyancing, their proper place in a legal system is among contract rights and remedies. An irritancy or forfeiture of a right may take place by force of law as an implied term of the contract in respect of failure to implement an essential condition, such as payment of feu-duty. An irritancy of this class is a legal irritancy. Forfeiture of a right may also arise in consequence of express agreement between the parties to a contract. Almost any stipulation or condition in a contract may be fortified in this way. An irritancy of this class is a conventional irritancy.

969. The primary purpose of all irritant clauses is to secure compliance with the conditions of the contract, and accordingly the right to found on the irritancy belongs to the party entitled to enforce the condition. The right may be waived by the person vested with it. On the other hand, the party in breach of the condition, and thereby incurring the irritancy, may in certain cases escape the penal consequences by tendering exact performance before a decree enforcing the irritancy is issued against him. This right to purge the irritancy attaches as a rule only to legal irritancies.

Section 2.—Legal Irritancies.

Subsection (1).—*Irritancy* ob non solutum canonem.

970. Of irritancies implied by law the most important is the irritancy *ob non solutum canonem*, or tinsel of the feu. It arises upon failure to

pay the feu-duty for two successive years. Although it is incident to every feu-right, it was expressly provided for in the Scots Act, 1597, c. 250.[1] The statute, as may be seen from its terms, is declaratory of the civil and canon law, and a condition of irritancy upon failure to pay the feu-duty for two years is good at common law.[2]

(i) *Enforcement of the Irritancy.*

971. Whether the irritancy be legal or conventional—it is often embodied in an express stipulation—a declarator of irritancy is necessary before forfeiture can follow. Even an express stipulation that the irritancy shall take effect *ipso facto* and without the necessity of declarator will not receive effect.[3] The parties may contract out of the statute so as to deprive the superior of his right to irritate,[4] as where there is in the feu-right an express renunciation of the power.[5] The right may be waived, and waiver is a question of fact.[6] The right to enforce an irritancy is a privilege introduced in favour of one party to the contract. It does not operate so as to make the feu-right void, but voidable.[7] It can be enforced only by the party aggrieved by the breach. It gives no right to the party in default. A party cannot, by failure to pay feu-duty for two years, claim that the feu-right has come to an end.[8] The right to irritate, on the other hand, is alternative to, not cumulative with, the usual remedies which arise upon breach of contract. Thus a superior cannot insist on an irritancy *ob non solutum canonem* and at the same time claim arrears of feu-duty or sue for damages in respect of the breach of the condition from which the right to irritate springs.[9]

972. The title to sue lies in the superior alone; his assignee or executor cannot sue a declarator of tinsel of the feu.[10] The holder of a security granted by the superior cannot sue, unless the form of his security is such as to have effected a divestiture of the superior, leaving to him only a personal *jus crediti* to insist upon reconveyance.[11] The superior can maintain a declarator for failure to pay such feu-duties only as have accrued and become due during his tenure of the superiority,[12] but, it is thought, he may sue on the score of arrears of feu-duties accrued before the vassal entered on the subjects.[13]

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[1] *Mags. of Edinburgh* v. *Horsburgh*, 1834, 12 S. 593.
[2] *Sandeman* v. *Scottish Property Investment Co.*, 1885, 12 R. (H.L.) 67, per Lord Watson at p. 72.
[3] Stair, iv. 18, 3; *Cassels* v. *Lamb*, 1885, 12 R. 722, 759; *Lockhart* v. *Shiells*, 1770, 2 Ross's L.C. 244; Mor. 7244; Bell's Prin., s. 701.
[4] *M'Vicar* v. *Cochrane and Ker*, 1740, Mor. 4180.
[5] Bell, Convey. i. 625.
[6] *Kinloch* v. *Mansfield*, 1836, 14 S. 905.
[7] *Inglis* v. *Wilson*, 1909 S.C. 1393.
[8] *Bidoulac* v. *Sinclair's Trs.*, 1889, 17 R. 144.
[9] *Mags. of Edinburgh* v. *Horsburgh*, *supra*; *Buttercase* v. *Geddie*, 1897, 24 R. 1128.
[10] *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958, at p. 964.
[11] *Campbell* v. *Bertram*, 1865, 4 M. 23; Stair, ii. 10, 1 and 13.
[12] *Wedderburn* v. *Nisbet*, 1612, Mor. 6322, 7181, 7831; *Maxwell's Trs.*, *supra*.
[13] *Maxwell's Trs.*, *supra*, per Lord Rutherfurd Clark.

(ii) *Purging the Irritancy.*

973. The irritancy when incurred may be purged by payment of the arrears of feu-duty. Formerly a distinction was drawn between the irritancy as arising *ex lege* and the case of its being an express stipulation.[1] Prior to the date of the passing of the Conveyancing Acts (1874 and 1879) Amendment Act, 1887,[2] the irritancy, whether arising *ex lege* or by convention, could be purged by paying the arrears of feu-duty and expenses at any time before the decree was extracted,[3] but by s. 4 of that Act, the law now is that no decree of declarator of irritancy *ob non solutum canonem* obtained after 1887 is deemed final until it has been recorded in the appropriate Register of Sasines. Prior to this enactment purchasers of lands had no security from the records that a vassal whose title appeared *ex facie* complete was not in reality divested by a decree irritating his rights. It would seem that tender of the feu-duty and expenses, but without interest, is sufficient.[4] Anyone having an interest, whether the vassal himself, subfeuars, purchasers from him, or holders of heritable securities, may come forward and purge the irritancy; but third parties so paying cannot at common law demand an assignation to the superior's rights against the vassal.[5] After decree has been extracted, the irritancy cannot be purged, and an offer of payment of the arrears tendered in an action of reduction of the decree comes too late.[6] The same effect would follow though the decree upon which extract is given be taken in absence, provided that the vassal was properly cited and had an opportunity of purging the irritancy before the decree was taken.[7] It is not a good defence that the feu-duty has been retained because of a dispute between the superior and the vassal,[8] but the latter is probably entitled to deduct a debt due to him by the superior, provided the debt is or can be made liquid.[9]

(iii) *Procedure.*

974. A proper declarator of irritancy was formerly competent only in the Court of Session. The action is now within the jurisdiction of the Sheriff Court. By s. 5 of the Sheriff Courts (Scotland) Act, 1907,[10] all actions of declarator of irritancy and removing, whether at the instance of a superior against a vassal or of a landlord against a tenant, are made competent in the Sheriff Court. The action must be raised in the Sheriff Court of the jurisdiction and district where the property forming the

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[1] Ersk. ii. 5, 27.

[2] 50 & 51 Vict. c. 69.

[3] *Rait* v. *Spence*, 1848, 11 D. 126; *Ballenden* v. *Duke of Argyll*, 1792, Mor. 7252; 2 Ross's L.C. 249; and see Wedderburn on Conveyancing, p. 40.

[4] *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958.

[5] *Guthrie and M'Connachy* v. *Smith*, 1880, 8 R. 107; see also *Hinshelwood's Trs.* v. *Watson*, 1877, 8 R. 108 n.

[6] *Ballenden* v. *Duke of Argyll*, *supra*.

[7] Ersk. ii. 6, 44 (Lord Ivory's note and cases cited there); *Kennedy* v. *Alison*, 1807, Hume 578; *Campbell* v. *M'Allister*, Mor. *voce* "Irritancy," App. No. 1.

[8] *Thom* v. *Chalmers*, 1886, 13 R. 1026.

[9] *Urquhart* v. *Mackenzie*, 1824, 3 S. 84 (N.E. 56).

[10] 40 & 41 Vict. c. 50.

subject in dispute is situated, and all parties against whom any such action may be brought shall in such action be subject to that jurisdiction. If the action is raised in the Sheriff Court, and it relates to questions where the value of the subject in dispute exceeds £50 per annum or £1000 in value, either party may at the closing of the record, or within six days thereafter, require the cause to be remitted to the Court of Session.[1] If the value of the subjects does not exceed £50, the jurisdiction of the Sheriff Court is privative. In an action of declarator of irritancy *ob non solutum canonem*, the pursuer has to call as parties the last-entered vassal and such heritable creditors and holders of postponed ground burdens as are disclosed by a search for twenty years prior to the action, the cost of search being part of the expenses of process.[2]

(iv) *Effect of the Decree.*

975. The effect of the irritancy, when declared and not purged, is that the feu reverts to the superior unaffected by subordinate rights granted by the vassal; for the "subordinate right is, from its nature, subject to the condition upon which the principal right, out of which it was derived, was created." [3] The effect of a decree is to make not merely the feuar's right but the feu-right itself null and void. Accordingly the lands fall back into the superior's hands unaffected by subfeus.[4] It also affects heritable securities. The annulling of the vassal's right is not necessarily attended with nullity of heritable securities granted over it by the vassal, but unless the holders of such securities come forward to purge the irritancy, the superior will be entitled to the land free of the burden.[5] This result does not follow if the superior's consent to the subfeus has been obtained, or where the superior had, under the former law, confirmed the base infeftments.[6] The implied entry introduced by the Conveyancing (Scotland) Act, 1874,[7] does not affect the superior's rights. The decree of irritancy does not carry to the superior personal claims competent to the vassal against third parties, though such claims be connected with the lands resumed, *e.g.* a claim competent to and vested in the feuar to compensation under the Lands Clauses Act, 1845.[8]

976. Where feu-duty has been allocated, the right to insist on the irritancy depends on the nature of the allocation. If this has been done by the superior or with his authority, each feu stands by itself and is liable under the legal irritancy for non-payment only of the feu-duty applicable to itself. If there has been an allocation effective among the

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[1] Sheriff Courts (Scotland) Act, 1907, s. 5, proviso (*a*). [2] *Ibid.*, Rule 110.

[3] *Sandeman* v. *Scottish Property Investment Co.*, 1885, 12 R. (H.L.) 67, per Selborne L.C. at p. 76.

[4] *Sandeman, supra ; Cassels* v. *Lamb*, 1885, 12 R. 722.

[5] Bell's Prin., s. 701 ; *Drummond* v. *Hamblin*, 1686, Mor. 7235, approved by Lord Rutherfurd Clark in *Sandeman* v. *Scottish Property Investment Co.*, 1883, 10 R. 632.

[6] *Sandeman, supra*, 12 R. (H.L.) 67, per Lord Watson at p. 74.

[7] 37 & 38 Vict. c. 94, s. 4. [8] *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917.

feuars, but not made or authorised by the superior, it would seem that the superior's right to irritate depends on the total original feu-duty being unpaid for two years, and that there is no action competent against the feuar of part of the lands in respect of his failure to pay the feu-duty allocated, without authority, on him.[1] Similarly, where a superior feued two separate subjects in one feu-contract, each was held liable to an irritancy for failure in respect of its own obligations, irrespective of the other.[2]

SUBSECTION (2).—*Irritancy for Non-payment of Ground Annuals.*

977. The remedy open to a superior for irritancy of a feu for non-payment of the feu-duty is not available in the case of the analogous but fundamentally different contract of ground annual. The original form of the contract was a disposition by the proprietor, who thus became the creditor, to another person who became the debtor in respect of an annual payment reserved out of the lands by the creditor. This annual payment was constituted as a real burden on the ground, and the creditor's remedies were those appropriate to the case of a real burden. The modern form of the contract has been evolved so as to give the creditor in the ground annual further remedies.[3] The Conveyancing (Scotland) Act, 1924,[4] however, gives the creditor a right to raise an action similar to the action of declarator of irritancy *ob non solutum canonem*. If the creditor holds a duly recorded title, and his debtor is due two years' ground annual, an action of adjudication may be raised against the proprietor of the land and any other persons interested therein whose rights are postponed to that of the creditor in the ground annual, the result of which is to forfeit the land, along with the unpaid rents, maills, and duties thereof, to the creditor, absolutely. The action may be raised in the Sheriff Court of the county in which the land out of which the ground annual is payable, or any part of such land, is situated; or where the ground annual is not less in amount than £2, 10s. per annum, in the Court of Session.

978. Where the contract of ground annual contains a conventional irritancy similar to that *ob non solutum canonem*, and the creditor raises an action based on his conventional irritancy, he is not entitled to sue for arrears.[5] Where a conventional irritancy for failure to pay two years' ground annual is stipulated for in the deed creating the right, the irritancy may be purged before extract,[6] but whether this right is implied in the exercise of the statutory power conferred by the Conveyancing Act, 1924, is not decided.

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[1] *Nelson's Trs.* v. *Tod*, 1901, 9 S.L.T. 369; Burns' Conveyancing Practice, p. 245.
[2] *Welsh* v. *Jack*, 1882, 10 R. 113.
[3] See Wedderburn on Conveyancing, pp. 77, 78.
[4] 14 & 15 Geo. V. c. 27, s. 23 (*b*).
[5] *Wingate's Trs.* v. *Wingate* (O.H.), 1892, 29 S.L.R. 406.
[6] *Duncanson* v. *Giffen* (O.H.), 1878, 15 S.L.R. 356.

Subsection (3).—*Irritancies for Non-payment of Rent under Agricultural Leases.*

979. Prior to 1756 there was at common law an implied legal irriancy where a tenant had failed to pay rent for two successive years.[1] The common law was recognised and defined by an Act of Sederunt of 14th December 1756.[2]

(i) *Act of Sederunt, 14th December* 1756.

980. The Act applies only to leases of agricultural (including pastoral) subjects.[3] The lease need not be written; it may be verbal, from year to year, or running on tacit relocation.[4] Sec. 4 provides that "where a tenant has irritated his tack by suffering two years' rent to be in arrear, it shall be lawful to the setter or heritor to declare the irritancy before the Judge Ordinary, and to insist in a summary removing before him; and it shall be lawful to the Sheriff to find the irritancy incurred, and to decern in the removing." The irritancy may be purged by payment of the arrears and expenses before extract. By s. 5 of the Act of Sederunt a further remedy is provided to the landlord in cases where the tenant (*a*) is in arrear of a full year's rent, or (*b*) deserts his possession and leaves the farm unlaboured. The Sheriff may ordain the tenant to find caution for the arrears due and for five future crops, or for the remainder of the lease if this be less than five years, and failing caution may remove him summarily.

981. These provisions have been modified and largely superseded by the Hypothec Abolition Act, 1880,[5] and by successive Agricultural Holdings Acts, the ruling statute now being the Agricultural Holdings (Scotland) Act, 1923.[6] The Small Landholders (Scotland) Act, 1911,[7] makes irritancy inapplicable to lands within its scope. The removal of a landholder under that statute does not give back the land to the landlord free from limitation. It remains a small holding.[8]

(ii) *The Agricultural Holdings (Scotland) Act*, 1923.

982. Sec. 25 of this Act provides that in any case in which the landlord's right of hypothec for the rent has ceased and determined—and this right ceased in the case of all agricultural leases dated subsequent to 11th November 1881—certain rights are available to a landlord for removing a tenant for non-payment of rent, and that the provisions of s. 5 of the Act of Sederunt of 14th December 1756 should not be appli-

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[1] See explanations by Lord Cowan and Lord Benholme in *Nisbet* v. *Aikman*, 1866, 4 M. 284, at pp. 289, 290; Bell's Prin., s. 1249.

[2] C.A.S., L, xv.

[3] As to mineral and fishing leases, see Rankine on Leases, 3rd ed., p. 533; *Wright* v. *Wightman*, 1875, 3 R. 68, at p. 70.

[4] *Munro* v. *Brown*, 1827, 5 S. 807.

[5] 43 Vict. c. 12, ss. 2, 3.

[6] 13 & 14 Geo. V. c. 10.

[7] 1 & 2 Geo. V. c. 49.

[8] The decisions on the Act of Sederunt are summarised in Rankine on Leases, 2nd ed., pp. 536–7.

cable to cases covered by that section. The provisions of the Act of Sederunt dealing with one year's arrears and with desertion have thus been superseded. Sec. 4 of the Act of Sederunt, which imposes an irritancy in respect of two years' arrears, is not affected. By s. 25 (1) of the Act of 1923, a landlord, when six months' rent is due and unpaid, may raise an action of removing before the Sheriff against the tenant, concluding for his removal at Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid or caution is found to the satisfaction of the Sheriff for the same and for one year's rent further, the Sheriff may eject the tenant as if the lease were at an end and proper notice of removal had been given. The tenant's rights to compensation as an outgoing tenant are retained by him.[1]

Subsection (4).—*Irritancies for Non-payment of Rent in Urban Leases.*

983. The common law remedy of an irritancy for failure to pay rent for two years is applicable to leases of houses, but is of no practical importance in view of the more summary remedies competent to a landlord. The rights of a landlord have been much modified by the Rent Restrictions Acts, to which reference is made.[2] A statutory irritancy for non-payment of rent in the case of small houses was introduced by the House Letting and Rating Act, 1911.[3] By s. 5 of that statute, if the occupier of a small dwelling-house shall at any time be in arrear with the rent of it for a period of not less than seven days, the owner may give the occupier forty-eight hours' notice to quit. Whether a house is a small dwelling within the Act depends on its value as set forth in the Valuation Roll and the population of the town in which it is situated. The Act does not come into operation in any burgh having a population of less than 10,000 unless it is adopted by the Local Authority.[4]

Section 3.—Conventional Irritancies.

Subsection (1).—*General.*

984. Any lawful stipulation or condition in a contract may be fortified by an irritancy. Such clauses, like other conditions of mutual contracts, are to be construed fairly and in accordance with the intention of the parties,[5] and will be enforced according to their terms.[6] Considerations of hardship are not relevant,[7] but lack of interest may bar a superior

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[1] 13 & 14 Geo. V. c. 10, s. 25 (1), (2).

[2] 10 & 11 Geo. V. c. 17; 13 & 14 Geo. V. c. 32; 14 & 15 Geo. V. c. 18; 15 & 16 Geo V. c. 32; continued by the Expiring Laws Continuance Act, 1927 (17 & 18 Geo. V. c. 34).

[3] 1 & 2 Geo. V. c. 53.

[4] Sec. 11; see generally Rankine on Leases, 2nd ed., pp. 575–6.

[5] *Moncrieff* v. *Hay*, 1842, 5 D. 249, 257; *Mags. of Glasgow* v. *Hay*, 1883, 10 R. 635.

[6] *Hannan* v. *Watson*, 1879, 7 R. 380.

[7] *Moncrieff*, *supra*, at pp. 259, 261.

from enforcing an irritancy.[1] If an irritancy is incurred, it is not relevant to aver that it is being enforced from ulterior motives,[2] but facts sufficient to support the irritancy must be proved.[3] The Court, however, in the exercise of its equitable jurisdiction will interfere to prevent gross abuse or oppression.[4] Conventional irritancies that are merely reproductions of irritancies implied by law are treated as equivalent to and subject to the rules which govern the corresponding legal irritancy. Thus though the general rule is that conventional irritancies are not purgeable, a conventional irritancy for failure to pay two years' feu-duty, if its terms add nothing to the force of the corresponding legal irritancy, is equally purgeable.

Subsection (2).—*Conventional Irritancies in Leases.*

985. Most of the questions regarding conventional irritancies have in modern practice arisen out of the contract of lease, but irritancy clauses may be found in other forms of contract. In addition to such clauses protecting a landlord against a tenant's failure to pay rent,[5] it is usual to find an irritancy stipulated for in the event of a tenant's bankruptcy, sequestration, granting a trust-deed for creditors, or similar act in evidence of insolvency.[6] In these and similar cases, the tenant cannot defend himself in a removing by tabling a discharge from his creditors.[7] A condition frequently fenced with an irritancy is the usual prohibition against assigning and subletting. The addition of the irritancy is designed to enable the landlord not only to avoid the assignation or sublet in virtue of the prohibition, but also to cut down the assignee's right.[8] Residence and stocking are often made the subject of irritancy clauses,[9] and special conditions may be thus protected, *e.g.* conduct likely to cause the loss of a licence may be prohibited under pain of irritancies.[10]

986. The provisions of s. 26 of the Agricultural Holdings (Scotland) Act, 1923,[11] as to termination of tenancy do not affect conventional irritancies. Subsection (4) provides that "Nothing in this section shall affect the right of a landlord to remove a tenant who has been sequestrated under the Bankruptcy (Scotland) Act, 1913, or who by failure

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[1] *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 40; *Lord Belhaven and Stenton* v. *Chassels*, 1904, 12 S.L.T. 290.

[2] *Guild* v. *Maclean*, 1897, 25 R. 106.

[3] *Noble* v. *Hart*, 1896, 24 R. 174.

[4] *Stewart* v. *Watson*, 1864, 2 M. 1414, at p. 1419.

[5] See *Duke of Argyll* v. *Campbeltown Coal Co.*, 1924 S.C. 844.

[6] *Moncrieff* v. *Hay*, 1842, 5 D. 249; *Scott* v. *Wotherspoon*, 1829, 7 S. 481; *Anstruther* v. *Greenshields*, 1855, 18 D. 59; *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144; *Hall* v. *Grant*, 1831, 9 S. 612; *Stewart* v. *Watson*, *supra*.

[7] *Gordon*, 1805, Mor. *voce* "Tack," App. No. 11; *Hall* v. *Grant*, 1831, 9 S. 612; *Tennant* v. *Macdonald*, 1836, 14 S. 976, at p. 979.

[8] Hunter, Landlord and Tenant, ii. 122; *Lyon* v. *Irvine*, 1874, 1 R. 512.

[9] Rankine, Leases, p. 545; *Stuart* v. *Warnock*, 1883, 20 S.L.R. 863.

[10] *Noble* v. *Hart*, *supra*; *Guild* v. *M'Lean*, *supra*.

[11] 13 & 14 Geo. V. c. 10.

to pay rent or otherwise has incurred any irritancy of his lease or other liability to be removed."

SUBSECTION (3).—*Conventional Irritancies in other Contracts.*

987. These may occur in feu-rights containing building restrictions.[1] Liability for casualties may be affected by subinfeudation being prohibited, coupled with an irritancy clause.[2] They may be found in contracts such as partnership. An irritancy of the co-partnery in the event of a partner becoming insolvent is valid.[3] But what is in terms an irritancy in a contract may on examination prove to be merely a penalty, and not enforceable. Where a contract of sale with a price payable by instalments contained a provision irritating the contract and thus forfeiting all that had been paid, it was held to be not a case of irritancy but of penalty, and the so-called irritancy could not be enforced.[4] The remedy in such a case would generally be damages.

SUBSECTION (4).—*Enforcement of Conventional Irritancies.*

988. Conventional, like legal, irritancies do not become effective, apart from consent, express or implied, without obtaining a decree. Although the irritancy is based on contract, and part of the contract may be an agreement to dispense with declarator, and may purport to give the injured party a right to hold the contract *ipso facto* null, that stipulation is of no assistance. The right to terminate the contract does not emerge until the facts are substantiated which constitute a breach of the protected condition. Thus assuming a landlord to have a clear option to terminate upon the breach of a condition in the lease, the additional stipulation as to *ipso facto* nullity carries him no further in a question with an antagonistic tenant. The facts founded on by the landlord as constituting the breach, if not admitted, have to be proved; and even if they are admitted, the question as to time of removal, whether instant or at a term following, may be a matter within the discretion of the judge.[5] An action of interdict is not an appropriate method of enforcing an irritancy.[6]

989. Enforcing the irritancy may extinguish or otherwise affect collateral obligations. Thus the termination of a lease by irritancy did not set into operation an obligation by the landlord to take over the tenant's stock at valuation at the tenant's waygoing. There was no "waygoing" in the sense of the obligation.[7] When a lease has been

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[1] *Mags. of Glasgow* v. *Hay*, 1883, 10 R. 635; *Napier* v. *Speirs*, 1831, 9 S. 655.
[2] *Inglis* v. *Wilson*, 1909 S.C. 1393; *Christie's Trs.* v. *Macdougall*, 1905, 7 F. 756.
[3] *Hannan* v. *Watson*, 1879, 7 R. 380.
[4] *Steedman* v. *Drinkle*, [1916] 1 A.C. 275.
[5] *M'Niven* v. *Murray*, 1847, 9 D. 1138; *Williamson* v. *Johnstone*, 1848, 11 D. 332; *Stewart* v. *Watson*, 1864, 2 M. 1414; *Lyon* v. *Irvine*, 1874, 1 R. 512.
[6] *Rankin* v. *M'Lachlan*, 1864, 3 M. 128; cf. *Chalmer's Tr.* v. *Dick's Tr.*, 1908, 16 S.L.T. 105.
[7] *Marquis of Breadalbane* v. *Stewart*, 1904, 6 F. (H.L.) 23.

irritated on account of the bankruptcy of the tenant, the irritancy clause may be wide enough to give the tenant's trustee no rights in the crop sown by the tenant before bankruptcy but not ingathered till after.[1]

990. A landlord may be barred by his actings from insisting on a conventional irritancy, but surrender of his rights will not be readily inferred.[2] The necessity for a declarator of irritancy in an action of removing on the ground of a conventional irritancy in a lease is ultimately a matter in the discretion of the Court. But where there is any question as to the validity of the documents constituting the lease or setting forth the condition alleged to be broken, declaratory conclusions are advisable.[3]

SUBSECTION (5).—*Purging of Conventional Irritancies.*

991. The general rule is that conventional irritancies cannot be purged, and that considerations of hardship are out of place in a question of enforcing an unambiguous provision in a contract.[4] The emergence of the right to irritate, and the election to stand upon the right which is implied in the raising of an action to enforce it, imply also the negation of any subsisting right in the offender to perform the contract. The time for performance has gone past and the function of the Court is confined to the declaration and enforcement of the irritancy, if it is proved to have been incurred. Even in such a case, however, the Court may allow an irritancy to be purged when its exercise is shown to be oppressive, as where it is sought to be enforced without giving adequate notice that the condition is not being implemented.[5] An agreement in a lease that the tenant should not be entitled to purge a conventional irritancy has been held valid.[6]

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[1] *Chalmer's Tr.* v. *Dick's Tr.*, 1909 S.C. 761.
[2] *Penman* v. *Mackay*, 1922 S.C. 385.
[3] *Duke of Argyll* v. *Campbeltown Coal Co.*, 1924 S.C. 844.
[4] *Lyon* v. *Irvine*, 1874, 1 R. 512; *Chalmer's Tr.* v. *Dick's Tr.*, *supra*.
[5] *Stewart* v. *Watson*, 1864, 2 M. 1414.
[6] *Earl of Elgin* v. *Whittaker & Street* (O.H.), 1902, 9 S.L.T. 375.

IRRITANT AND RESOLUTIVE CLAUSES.

See ENTAIL; IRRITANCIES.

ISH AND ENTRY.

See LEASE.

ISSUE.

See SUCCESSION.

ISSUES.

See JURY TRIAL.

ITER.

See SERVITUDES.

JEDGE AND WARRANT.

See DEAN OF GUILD.

JETTISON.

See AVERAGE; INSURANCE (MARINE).

JEWS.

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Section 1.—Political Disabilities.

992. Most of the disabilities to which Jews were formerly subjected in respect of their religious opinions have now been removed. But a Jew is still subject to the following disqualifications, viz. that he is incompetent to fill certain high offices in the State, and is unable to present to any ecclesiastical benefice, the right of appointment to which may belong to any office in His Majesty's gift which he may happen to fill.[1] In such cases the right of presentation, in case of a vacancy, will devolve upon the Archbishop of Canterbury for the time being. A Jew, however, provided he be the owner of an advowson in his own right, may present to it.[2] In regard to disqualification for the higher offices in the State, it is provided [3] that "nothing herein contained shall extend, or be construed to extend, to enable any person or persons professing the Jewish religion to hold or exercise the office of guardians and justices of the United Kingdom, or of Regent of the United Kingdom, under whatever name, style, or title such office may be constituted, or of Lord High Chancellor, Lord Keeper, or Lord Commissioner of the Great Seal of Great Britain or Ireland, or of the office of Lord Lieutenant or Deputy or other Chief Governor or Governors of Ireland, or Her Majesty's High Commissioner to the General Assembly of the Church of Scotland."

993. By the Religious Opinions Relief Act [4] many Acts which imposed penalties and disabilities in respect of religious opinions were repealed; and it was provided (s. 2) that in respect of their schools, places of worship, education, and charitable purposes, and property held therewith, Jews should be subject to the same laws as Protestant Dissenters. Liberty of religious worship was secured to them in 1855; [5] and in 1866 [6] it was made unnecessary to make and subscribe certain declarations as to qualification for offices and employments in England imposed by the Act of 1845, entituled "An Act for the Relief of Persons of the Jewish Religion Elected to Municipal Offices." [7]

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[1] 21 & 22 Vict. c. 49, s. 4.
[2] Stephen, Com. ii. 712.
[3] 21 & 22 Vict. c. 49, s. 2.
[4] 9 & 10 Vict. c. 59.
[5] 18 & 19 Vict. c. 86, s. 2.
[6] 29 & 30 Vict. c. 22.
[7] 8 & 9 Vict. c. 52.

994. Prior to 1858 a Jew could not vote in the House of Commons except under a ruinous penalty. But in that year an Act was passed [1] enabling either House to dispense with the use of the words, "On the true faith of a Christian," by resolution in individual cases; and in 1860 another Act [2] gave power to either House to make a standing order to the same effect. Meantime, in 1858, a single form of oath had been prescribed,[3] instead of the three oaths of allegiance, supremacy, and abjuration; and finally, in 1866,[4] the words which caused the difficulty were omitted from the statutory form required. By the Oaths Act of 1888 [5] it was provided that in all places and for all purposes where an oath is or shall be required by law, an affirmation may be made.

Section 2.—Statutory Privileges.

995. It is provided by the Factory and Workshop Act, 1901, that a child or young person or woman shall not, saving as in the Act provided, be employed on a Sunday in a factory or workshop.[6] The saving relates to Jewish factories and workshops, as to which provision is made for permitting the employment on Sundays of a woman or young person of the Jewish religion where the workshop or factory is in the occupation of a person professing the Jewish religion, and is closed on Saturday, and is not open for traffic on Sunday.[7] If all the children, young persons, and women in the workshop or factory are of the Jewish religion, a Jewish employer may, by notice publicly fixed, give any two of the public holidays fixed by the Act.[8] The Jewish custom in regard to the slaughter of animals is provided for by the Slaughter of Animals (Scotland) Act, 1928.[9] By rule 26 of the Ballot Act [10] provision is made for the marking of a voting paper, where the poll at an election is on Saturday, and where the voter is a Jew, who objects on religious grounds to vote in manner prescribed by the Act.

Section 3.—Matrimonial Law.

996. Subject to the provisions of the recent statutes relating to marriages and prohibited degrees, the matrimonial law for the Jews consists of their own laws or usages. Marriages amongst persons professing the Jewish religion are expressly excepted from the operation of the Marriage Acts.[11] All persons professing the Jewish religion may continue to contract and solemnise marriages according to their own usages; and every such marriage is declared and confirmed good in law, provided that the parties both profess the Jewish religion, and that due notice shall have been given, and the certificate

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[1] 21 & 22 Vict. c. 49.
[2] 23 & 24 Vict. c. 63.
[3] 21 & 22 Vict. c. 48.
[4] 29 Vict. c. 19, ss. 1, 4.
[5] 51 & 52 Vict. c. 46.
[6] 1 Edw. VII. c. 22, ss. 47, 60.
[7] *Ibid.*, s. 48; see *Goldstein* v. *Vaughan* [1897] 1 Q.B. 549.
[8] *Ibid.*, s. 34.
[9] 18 & 19 Geo. V. c. 29, ss. 2 (6) and 8.
[10] 35 & 36 Vict. c. 33.
[11] See 26 Geo. II. c. 33, and 4 Geo. IV. c. 76.

for the marriage shall have issued in conformity with the provisions of the Act.[1] By this enactment, Jews, upon giving notice to the superintendent registrar of the district in which they are dwelling, and obtaining his certificate, are empowered to contract and solemnise marriage in any place sanctioned by their "usages," and they are not restricted to the district of the superintendent registrar to whom the notice has been given. By the Marriage and Registration Act of 1856 [2] it is provided that the marriages of Jews may be solemnised by licence, which licence the superintendent registrar to whom notice of the intended marriage shall have been given is thereby authorised to grant in the form of Schedule C annexed to the Act.

997. By the Jewish religion, marriages are allowed within certain degrees of consanguinity and affinity prohibited by our law. Similarly, according to the Jewish ecclesiastical law, divorces may be obtained on grounds not recognised by the law of Scotland, *e.g.* incompatibility of temper.[3] While within the religious community to which they belonged it might be possible for a Jew and a Jewess to agree to the dissolution of a marriage and to enter into another marriage in conformity with their ecclesiastical law without incurring any social stigma, such a second marriage would unquestionably bring the parties to it within the sanction of the criminal law of Scotland, and the so-called divorce would not be recognised by the Courts as altering or affecting in any degree the patrimonial rights or the status of the parties or of the issue of the dissolved marriage. By the ancient law of England mixed marriages were regarded as felonies. But in *Goodman* [4] the Court of Appeal presumed a valid marriage between a Jew and a Christian. It appears that the stricter Jewish teaching is that such marriages are, for religious purposes, invalid.[5]

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[1] 6 & 7 Will. IV. c. 85 ; see also 3 & 4 Vict. c. 72, s. 5.

[2] 19 & 20 Vict. c. 19, s. 21. As to methods of proof of Jewish marriages, see Hammick, Marriage Law of England, p. 159.

[3] See Hammick, *op. cit.*, p. 164 ; *Moss* v. *Smith*, 1840, 1 Man. & G. 232.

[4] *Goodman* v. *Goodman*, 1859, 28 L.J. Ch. 745.

[5] Phillimore, Ecclesiastical Law, 2nd ed., p. 563.

JOBBER.

See STOCK EXCHANGE.

JOINT ADVENTURE.

See PARTNERSHIP.

JOINT AND SEVERAL RIGHTS.

See CONJUNCT RIGHTS.

JOINT COMMITTEES.

See COUNTY COUNCIL.

JOINT OBLIGATIONS.

See OBLIGATION.

JOINT STOCK COMPANIES.

See COMPANY.

JOURNALS OF PARLIAMENT.

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JUDGE ADVOCATE.
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Section 1.—Introductory.

998. Prior to 1868, if it was desired to enforce a decree obtained from the Courts of one country in another country of the United Kingdom, it was necessary to apply for and obtain a decree conform from the Courts of the latter country. This procedure entailed delay and expense. In 1868 there was enacted the Judgments Extension Act,[1] which applies to judgments pronounced in the superior Courts of England, Scotland, or Ireland, and the procedure introduced by that Act was subsequently extended to the inferior Courts.[2]

999. Under the Act of 1868, where a judgment has been obtained in any Court in either England, Scotland, or Ireland for any "debt, damages, or costs," and it is desired to give effect to the judgment in one of the three countries other than that within which the Court by whom the judgment has been pronounced is situated, this may be effected by registering in the Courts of the country in which it is desired to give effect to the judgment a certificate from the Court that has pronounced the judgment, setting forth its terms. Thus a judgment obtained in any Court in Scotland for any "debt, damages, or costs" may be given effect to in England or Ireland by registering a certificate, obtained from the Scottish Court, in the Courts of either England or Ireland, and *vice versa*. The forms of the certificate to be obtained are contained in the schedule appended to the Act.

Section 2.—Extension of English and Irish Decrees to Scotland.

1000. The second section of the Act of 1868 provides for the extension to Scotland of any judgment for "debts, damages, or costs" obtained in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively. This definition has been held to include a judgment of any Division of the High Court of Justice

[1] 31 & 32 Vict. c. 54. [2] 45 & 46 Vict. c. 31.

wherever it may have been pronounced.[1] On the establishment of the Supreme Courts of Northern Ireland in 1920 existing enactments relating to the Supreme Court of Judicature in Ireland were applied to the Court at Belfast.[2] Since 1922 the statute, so far as regards Irish judgments, has ceased to apply to the Supreme Court at Dublin.[3] The section further provides for the registration of the certificate, which has to be produced at the office kept in Edinburgh for the registration of deeds, bonds, protests, and other writs registered in the Books of Council and Session, and is there registered in a book kept for the purpose, and called the Register for English and Irish Judgments, in the same manner as a bond containing a clause for registration is registered.

1001. A certificate so registered has the same force and effect as a decree of the Court of Session, and all proceedings may and shall be taken on an extract of such a certificate as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session on the date of such registration.[4] The costs of registering the certificate may be recovered as if they were part of the original judgment. No certificate may be registered more than twelve months after the date of the judgment without leave from the Lord Ordinary on the Bills. It has been held that it is not necessary that a debtor should be domiciled in Scotland in order to enable his creditor to put a judgment obtained in the High Courts of England into effect against him by registration in Scotland.[1]

Section 3.—Extension of Scottish Decrees to England and Ireland.

1002. Sec. 3 of the Act of 1868 provides for effect being given in England and Ireland to a judgment of the Court of Session in Scotland. In this case the certificate of an extracted decreet for the payment of any "debt, damages, or expenses," signed by the extractor of the Court of Session, or by any other officer duly authorised to make and subscribe extracts, or a certificate of an extracted decreet of registration in the Books of Council and Session purporting to be signed by the keeper of the register of deeds, bonds, protests, and other writs registered in the Books of Council and Session, must be produced to the senior Master of the Court of Common Pleas at Westminster, or to the Master of the Court of Common Pleas at Dublin, to be registered in books kept for the purpose, called the Register for Scotch Judgments. The application of the Act as regards Ireland has since 1922 been

[1] *English's Coasting and Shipping Co.* v. *British Finance Co.*, 1886, 14 R. 220, per Lord Pres. Inglis at p. 225.

[2] 10 & 11 Geo. V. c. 67, s. 41.

[3] 13 Geo. V. Sess. 2, c. 2, s. 1, and Schedule I. 6; see *Wakeley* v. *Triumph Cycle Co.*, [1924] 1 K.B. 214; *Cooney* v. *Dunne*, 1925, S.L.T. 22.

[4] See C.A.S., B, vi. 5 and K, vi. as to *inducia* of charge on such a certificate and fees of registration.

restricted to Northern Ireland, and registration must now be made through the Master of the Court of Common Pleas at Belfast.[1] The same rules apply as to the effect of such a certificate when registered, and as to the costs in connection therewith, as apply to English judgments registered in Scotland, and leave must be obtained to register the judgment if twelve months have elapsed from the date of its being pronounced. When a note of suspension of any such decreet has been passed or a sist of execution shall have been granted in Scotland, execution on such a certificate in England is stayed until such sist has expired, or until the reasons of suspension have been repelled. But in order to stay the execution of the registered certificate in England a further certificate must be produced, signed by the Clerk to the Bill Chamber of the Court of Session, or any judge thereof, certifying that such note has been passed, or that such a sist has been granted.

1003. The English case cited below[2] illustrates the effect of a registered certificate. The creditor of a deceased debtor who died domiciled in England arrested trifling funds belonging to the debtor in Scotland. He then claimed against the executrix of the deceased both in England and Scotland. In England his claim was disallowed as barred by the Statute of Limitations, but in Scotland he obtained decree. Having registered a certificate of the judgment of the Court of Session in the English Courts, he claimed the sum to which he had been found entitled in Scotland, and it was held that the terms of the Scottish judgment must be given effect to, in spite of the fact that the claim had already been held in England to be barred. It was held in the same case that after registration it is incompetent to try and shew that the judgment obtained was wrong. It has also been held that no Scottish judgment other than one for debt, damages, or costs can be enrolled in the Chancery Division.[3]

1004. The Act of 1868 further provides that, in so far as relates to execution of the registered certificate of a judgment or decree, the superior Courts in England, Ireland, and Scotland shall have and exercise the same control and jurisdiction over any judgment or decree, and over any registered certificate of such judgment or decree, as they now have and exercise over any judgment or decree of their own Court (s. 4). Unless the Court on special grounds[4] orders otherwise, it is not necessary that a party to an action in Scotland, but resident in England or Northern Ireland, should sist a mandatary, or otherwise find security for expenses in respect of such residence (s. 5). Similarly, a plaintiff in the Courts of England or Northern Ireland who resides in Scotland need not find security for costs in respect of such residence (s. 5). No

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[1] 13 Geo. V. Sess. 2, c. 2, s. 1, and Schedule I. 6, restricting 10 & 11 Geo. V. c. 67 to Northern Ireland.

[2] *In re Low*, [1894] 1 Ch. 147.

[3] *In re The Dundee Suburban Rly. Co.*, 1888, 37 W.R. 50.

[4] See *Dessau* v. *Daish*, 1897, 24 R. 976; *Lawson's Trs.* v. *British Linen Co.*, 1874, 1 R. 1065.

one bringing an action in any Court in England, Scotland, or Northern Ireland on any judgment or decree which might be registered under the Act in the country in which such action is brought is entitled to recover the expenses of the suit, unless the Court shall order otherwise (s. 6). And finally, the Act does not apply to any decree pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland (s. 8).

Section 4.—Extension of Decrees of Dominion Courts.

1005. Under the Administration of Justice Act, 1920,[1] provision is made for the enforcement in the United Kingdom of judgments of superior Courts in the Dominions. Where a judgment has been obtained in a superior Court in any part of His Majesty's dominions outside the United Kingdom (including protectorates and mandated territories[2]) to which Part II. of the Act is applied by Order in Council,[3] the judgment creditor may apply to the Court of Session at any time within twelve months after the date of the judgment, or later with leave of the Court, to have the judgment registered in the Court, and the Court may, subject to certain safeguards,[4] order registration.[5] The application is to be made by petition to the Lord Ordinary on the Bills.[6] When the judgment has been registered it has the same effect as if it had been originally obtained in the Court of Session on the date of registration. The Court has the same control and jurisdiction over the judgment as regards execution as it has over its own judgments,[7] and may award expenses and also make rules for suspending execution of the judgment pending an application by the debtor to have the registration set aside.[8] This has been done by Act of Sederunt, in terms of which notice of the registration must be made in the prescribed form to the judgment debtor, who may apply to have the registration set aside. If no such application is made, or if it is made and refused, the Clerk of the Bills shall grant a certificate to that effect, and extract of the registered judgment shall then be issued.[9]

1006. Where a judgment has been obtained in the Court of Session, the Court, on an application by the judgment creditor and on proof that the judgment debtor is resident in some part of His Majesty's dominions outside the United Kingdom to which the Act extends, issue to the judgment creditor a copy of the judgment.[10] This is with a view to its enforcement in the dominion. As regards the dominions the Act may only be made applicable where His Majesty is satisfied that reciprocal provisions have been made.[11] The form of application is regulated by the Act of Sederunt.[12] Judgment means any judgment or order given or made by a Court in any civil proceedings, whether before

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[1] 10 & 11 Geo. V. c. 81.
[2] *Ibid.*, s. 13.
[3] *Ibid.*, s. 14.
[4] *Ibid.*, s. 9 (2).
[5] *Ibid.*, s. 9 (1).
[6] A.S., 20th June 1928, s. 1.
[7] 10 & 11 Geo. V. c. 81, s. 9 (3).
[8] *Ibid.*, s. 9 (4).
[9] A.S., 20th June 1928, s. 6.
[10] 10 & 11 Geo. V. c. 81, s. 10.
[11] *Ibid.*, s. 14.
[12] A.S., 20th June 1928, s. 8.

or after the passing of the Act, whereby any sum of money is made payable, and includes an award in an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place.[1]

1007. The following are the dominions to which the Act has been extended, viz.: Ashanti, Bahamas, Barbados, Basutoland, Bechuanaland Protectorate, Bermuda, British Guiana, British Honduras, British Solomon Islands Protectorate, Ceylon, Cyprus, Falkland Islands, Fiji, Gambia, Gibraltar, Gilbert and Ellice Islands, Gold Coast Colony, Grenada, Hong Kong, Jamaica, Johore, Kedah, Kenya Colony and Protectorate, Leeward Islands, Malay Federated States, Mauritius, Newfoundland, New Guinea, New South Wales, New Zealand, Nigeria Colony and Protectorate, Norfolk Island, Northern Rhodesia Protectorate, Northern Territories of the Gold Coast, Northern Territory of Australia, Nyasaland Protectorate, Palestine, Papua, St. Helena, St. Lucia, St. Vincent, Seychelles, Sierra Leone Colony and Protectorate, Somaliland Protectorate, South Australia, Southern Rhodesia, Straits Settlements, Swaziland Protectorate, Tanganyika Territory, Trinidad and Tobago, Uganda Protectorate, Victoria, Wei-hai-Wei Protectorate, Western Australia, Zanzibar Protectorate.[2]

Section 5.—Extension of Decrees of Inferior Courts.

1008. The Inferior Courts Judgments Extension Act, 1882,[3] extends the above facilities to judgments of inferior Courts, and its provisions are similar to those of the Act of 1868. The Act applies to judgments pronounced in Sheriff Courts and all Courts held under the Small Debt Acts in Scotland; to County Courts, Civil Bill Courts, and all Courts in England and Northern Ireland having jurisdiction to hear and determine civil causes other than the High Courts of Justice; and to Courts of Petty Session and of Bankruptcy in Northern Ireland. It may be noted that, where a judgment obtained in an inferior Court in Scotland cannot be registered in England or Northern Ireland by reason of its being for a greater amount than might have been recovered if the action had been originally commenced in such inferior Court, the certificate may be registered in one of the superior Courts as if it were a certificate of a decree of the Court of Session (s. 9).

1009. The party holding the judgment gets from the sheriff-clerk, on proving to him that the judgment has not been satisfied, and provided that a year has not elapsed from the date of the judgment, a certificate detailing the nature of the judgment. The forms of certificate are contained in the schedule to the Act. This certificate will be granted only if the time for appealing the judgment has elapsed, or, if appeal having the effect of staying execution has been taken, after such

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[1] 10 & 11 Geo. V. c. 81, s. 12 (1).
[2] See Index to S.R. & O. in force 31st August 1927, p. 405.
[3] 45 & 46 Vict. c. 31.

appeal has been disposed of. Registration of this certificate by the registrar or other proper officer of a County Court, or of the City of London Court, in England, or of a Civil Bill Court in Ireland, gives the certificate the effect of a judgment of the Court in which it is registered, and execution may be done thereon against such goods and chattels of the person decerned against as are within the jurisdiction of such Court. Where a certificate of judgment of an inferior Court in England or Northern Ireland has been registered in Sheriff Court Books in Scotland, an extract is not required as a warrant for diligence. It is sufficient that the sheriff-clerk attests the certificate and note of presentation.[1]

1010. The Act does not apply where the judgment is pronounced by the inferior Court of one country against a person domiciled in one of the other two countries as at the date of the commencement of the action, unless the whole cause of action shall have arisen or the obligation to which the judgment relates ought to have been fulfilled within the district of such inferior Court and the summons was served upon the defender personally within the said district (s. 10). Where an attempt is made by registration to enforce a judgment to which the Act does not apply, the remedy is to apply for a prohibition or injunction against the enforcement of the judgment to the superior Courts in England or Northern Ireland, or for the suspension of such enforcement in the Bill Chamber in Scotland, and the unsuccessful party in such proceeding may be found liable in costs (s. 10).[2]

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[1] C.A.S., L, ix. 2.

[2] See *Gartland* v. *Sweeney* (O.H.), 1920, 2 S.L.T. 172 ; *Laughland* v. *Wansborough Paper Co.* (O.H.), 1921, 1 S.L.T. 341 ; *Cumming* v. *Parker, White & Co.* (O.H.), 1923, S.L.T. 455.

JUDICATUM SOLVI.

JUDICIAL CAUTION.

See CAUTION.

JUDICIAL COMMITTEE.

See PRIVY COUNCIL.

JUDICIAL EXAMINATION.

See CRIME (PROCEDURE).

JUDICIAL FACTOR.

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Section 1.—The Office of Judicial Factor.

Subsection (1).—*Nature of Office.*

1011. A judicial factor is an officer of Court appointed by the Court of Session, in the exercise of its *nobile officium*, or by that Court or the Sheriff Court, under statute, to conserve and manage estate which is the subject of litigation, or is, from any cause, without legal or competent protection and administration. The appointment of a judicial factor is always temporary in the sense that it may be recalled at any time by the Court, and that it is brought to an end by the recovery of any insane person upon whose estate an appointment has been made, the coming of age of a minor or a pupil, the return of an *absens*, or the appearance of any person entitled by law to the management of the estate.[1]

Where an estate is exposed to imminent risk an interim appointment may be made, in the discretion of the Court, pending the intimation and disposal of an application for appointment of a judicial factor.[2]

Subsection (2).—*Classes of Factors.*

1012. Judicial factors may be classified according to the character of their appointments as:

Factors *loco tutoris*.

Factors *loco absentis*.

Curators bonis to minors.

Curators bonis to insane persons.

Judicial factors on trust estates.

Judicial factors on intestate estates.

Judicial factors on partnership estates.

Judicial factors appointed pending litigation.

Judicial factors appointed under section 163 of the Bankruptcy Scotland Act, 1913.

Judicial factors appointed under s. 14 of said Act.

Judicial factors appointed under the Companies Clauses Act, 1845, and under the Railway Clauses Act, 1847.[3]

Subsection (3).—*Earlier Forms of Protection of Estate.*

1013. The guardianship of unprotected persons is vested in the Crown, and from early days this guardianship was exercised by gifts of tutory issued through the Exchequer.[4] As regards the appointment of guardians to insane persons the procedure is now regulated by s. 101

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[1] *Bryce* v. *Graham*, 1828, 6 S. 425, at p. 430; affd. 3 W. & S. 323; *Turnbull* v. *Ross's J.F.*, 1916, 2 S.L.T. 249; *Gowans, Petr.*, 1917, 2 S.L.T. 61.

[2] *Cuthbertson* v. *Gibson*, 1887, 14 R. 736.

[3] See *Annan* (*Leslie's J.F.*), 1925 S.C. 464, per the Lord President at p. 469; *James Chambers & Co.* v. *T. D. M'Neill & Son*, 1917, 1 S.L.T. 89.

[4] *Bryce* v. *Graham*, 1828. 6 S. 425.

of the Court of Session Act, 1868. The old procedure is abolished, and it is enacted that in lieu thereof a brieve from Chancery, written in the English language, shall be directed to the Lord President of the Court of Session directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age. The brieve is tried before a judge of the Court of Session and a special jury.[1] A tutor dative is now appointed on a summary petition to the Inner House of the Court of Session acting as the Court of Exchequer.[2] The petition must be intimated to the Lord Advocate.[3]

1014. Appointments made under these forms of procedure are permanent and exclude the appointment of a judicial factor; if made subsequent thereto they terminate the factor's appointment, which should then be recalled.[4] Tutors and curators nominate, tutors at law, and curators chosen by minors in like manner exclude and terminate, as a general rule, the appointment of a judicial factor, as also does the election of a trustee in bankruptcy.[5] In a recent case the Court saw no reason for holding it incompetent to appoint a tutor dative to a ward's person while allowing the management of her estate by a *curator bonis* to continue,[6] and this was done of consent of parties.

Subsection (4).—*Appointments under* Nobile Officium.

1015. The old procedure in approaching the Crown was cumbrous and subject to delays, and did not meet all the cases in which protection of estate was required, and at an early date a practice grew up of applying to the Privy Council, and later to the Court of Session, as coming in place of the Privy Council, for the appointment of judicial factors under the *nobile officium* of the Court. These applications became so frequent that an Act of Sederunt was passed in 1730 to regulate the procedure in the appointment and administration of these officers.[7] All judicial factors are now appointed subject to the provisions of the Pupils Protection Act, 1849,[8] and succeeding statutes.

Section 2.—Distribution of Business Act, 1857.

Subsection (1).—*Jurisdiction of Lord Ordinary.*

1016. The Distribution of Business Act, 1857,[9] provides that all summary petitions and applications to the Court of Session, which are

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[1] 31 & 32 Vict. c. 100, s. 101.

[2] Court of Exchequer Scotland Act, 1856 (19 & 20 Vict. c. 56, s. 19); Maclaren, Court of Session Practice, p. 110; *Dick* v. *Douglas*, 1924 S.C. 787.

[3] *Wilson, Petr.*, 1857, 19 D. 286; *Graham, Petr.*, 1881, 8 R. 996.

[4] *Bryce* v. *Graham*, 1828, 6 S. 425; *Young* v. *Rose*, 1839, 1 D. 1242; *Irving* v. *Swan*, 1868, 7 M. 86; *Simpson* v. *Simpson*, 1891, 18 R. 1207.

[5] *Newall's Trs.* v. *Aitchison*, 1840, 2 D. 1108.

[6] *Dick* v. *Douglas*, 1924 S.C. 787, per the Lord President at p. 793.

[7] *Bryce* v. *Graham, supra*; Maclaren's Court of Session Practice, p. 164; Bill Chamber Practice, p. 127.

[8] 12 & 13 Vict. c. 51; 52 & 53 Vict. c. 39, s. 6.

[9] 20 & 21 Vict. c. 56, s. 4.

not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, and in particular petitions and applications for the appointment of judicial factors, factors *loco tutoris*, factors *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration and discharge; and all petitions, applications, and reports under the Pupils Protection Act, 1849. The Bill Chamber of the Court of Session is now the Junior Lord Ordinary's office.[1]

1017. Petitions continue before the Junior Lord Ordinary for the time being,[2] but where the Junior Lord Ordinary declines,[3] or on other cause shewn, a cause may be transferred to another judge.[4] Petitions, being originally Inner House processes, do not, though now presented in the Outer House, fall asleep.[5]

Subsection (2).—Nobile Officium *not Affected.*

1018. While petitions and applications falling under the statute must be presented to the Junior Lord Ordinary, this in no way interferes with the authority of the Inner House, in the exercise of the *nobile officium*, to make any appointment or to grant any order they may deem appropriate in a process which is competently before them.[6]

1019. Petitions incident to actions or causes actually pending at the time of presenting are excepted under the statute and must still go to the Inner House.[7] In one case an appointment was made by the Junior Lord Ordinary pending the decision in an existing action of reduction of a will,[8] and this may have been followed in later cases unreported, but it is at least doubtful practice. Incidence with an action in the Sheriff Court does not exclude the jurisdiction of the Junior Lord Ordinary.[9]

1020. When the main purpose of an application is to obtain the sanction or authority of the Court by the exercise of the *nobile officium*, and the crave for appointment of a judicial factor is subsidiary, the application should be presented to the Inner House.[10] Thus where the primary crave of the petition is for the removal of a trustee, followed by a secondary crave for appointment of a judicial factor to manage the estate after the trustee's removal, the Inner House is the appropriate tribunal.[11] Similarly, where the primary crave is for the approval of a scheme for the administration of a charity the authority of the Inner

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[1] 52 & 53 Vict. c. 54, s. 4.

[2] *Kirkwood*, 17 D. 416.

[3] *Cunningham*, 1867, 6 M. 120.

[4] *M'Cardle's J.F.*, 1906, unreported.

[5] *Innes, Chambers & Co.* v. *T. D. M'Neill & Son*, 1917, 1 S.L.T. 89; *Wemyss*, 1860, 22 D. 556.

[6] *Carmont and Ors., Petrs.* (*Comrades of the Great War*), 1922 S.C. 686; *Prime Gilt Box Society*, 1920 S.C. 534; *Anderson's Trs.*, 1921, 1 S.L.T. 186.

[7] *Speirs* v. *Speirs*, 1877, 5 R. 75; *Rintoul*, 1862, 1 M. 214.

[8] *Blackwood* v. *Reith*, 1906, 13 S.L.T. 629.

[9] *Booth* v. *Mackinnon*, 1908, 15 S.L.T. 848.

[10] *Mitchell, Petr.*, 1864, 2 M. 1378; *Rhind* v. *Sheach*, 1875, 2 R. 1002.

[11] *Mitchell, Petr., supra*; *M'Whirter* v. *Latta*, 1889, 17 R. 68.

House must be sought.[1] It has been held that a petition at the instance of creditors for appointment of a judicial factor on the estate of debtors alleged to be insolvent and to be making gratuitous alienations and granting undue preferences was not competent before the Junior Lord Ordinary, but only in the Inner House.[2]

1021. On the other hand, when the primary purpose of the application is the appointment of a judicial factor, the petition must be presented to the Junior Lord Ordinary, who may sequestrate the estate or make such other order as may be necessary to render the appointment effective.[3] In several cases the Inner House have sequestrated a trust estate and appointed a judicial factor, but in most of these it will be found that the petition contained a crave for removal which was refused.[4] In an application, which was refused, the crave for a factor was alternative to one for the appointment of an additional trustee.[5]

1022. A petition for dissolution of a partnership and appointment of a judicial factor to wind up the partnership estate, where procedure by petition is appropriate, should be made to the Junior Lord Ordinary.[6] If in the case of a partnership the parties are at variance with respect to matters requiring investigation and inquiry the appropriate procedure is an action of declarator.[7]

Subsection (3).—*Trust Petitions.*

1023. Petitions under the Trusts Acts by a sole trustee desiring to resign for appointment of a factor [8] are made as applications under the Trusts Acts to any Lord Ordinary in the Outer House.[9] After the appointment is made and the trustee discharged, if a judicial discharge is necessary,[10] the process is in practice remitted to the Junior Lord Ordinary for further procedure. Procedure under this section is competent to a body of trustees desiring to resign.[11] A factor may also be appointed under s. 8 (2) of the Trusts (Scotland) Act, 1921.[12]

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[1] *Prime Gilt Box Society*, 1920 S.C. 534.

[2] *Innes, Chambers & Co.* v. *T. D. M'Neill & Son*, 1917, 1 S.L.T. 89.

[3] *Rhind* v. *Sheach*, 1875, 2 R 1002; *Smith* v. *Smith*, 1892, 20 R. 27; *Scot, Petr.*, 1905, 13 S.L.T. 589; *Wilson, Petr.*, 1926, S.L.T. 576; 5 S.N. 107.

[4] *Foggo*, 1893, 20 R. 273; *Henderson*, 1893, 20 R. 536.

[5] *Yuill* v. *Ross*, 1900, 3 F. 96.

[6] *Thomson*, 1893, 1 S.L.T. 59; *Wallace* v. *Whitelaw*, 1900, 2 F. 675; *Blake's Trs., Petrs.*, 1920, 1 S.L.T. 231. This petition was presented to the Inner House and transferred on instructions to Junior Lord Ordinary.

[7] *Logan* v. *Cunningham*, 1903, 41 S.L.R. 23; *M'Nabs* v. *M'Nabs*, 1912 S.C. 421; *Elliot* v. *Cassells & Co.*, 1907, 15 S.L.T. 190; *Gow* v. *Schultze*, 1877, 4 R. 928; *Wallace* v. *Whitelaw, supra; Blake's Trs., supra.*

[8] 11 & 12 Geo. V. c. 58, s. 19 (2).

[9] *Ibid.*, s. 26.

[10] *Ibid.*, s. 18.

[11] *Maxwell's Trs.* v. *Maxwell*, 1874, 2 R. 71; *M'Math* (*Smith's Factor*), 1896, 4 S.L.T. 19.

[12] See para. 1071, *infra.*

SUBSECTION (4).—*Incidental Appointments.*

1024. Where the unsuitability of the legal guardian of pupil children is proved, and such guardian consents, the Court may in an ordinary action *de plano* appoint a factor *loco tutoris* to the children.[1]

SUBSECTION (5).—*Appointments in Vacation.*

1025. In vacation the Lord Ordinary on the Bills disposes of all petitions for factors whether presented to the Inner House, a Lord Ordinary in the Outer House, or the Junior Lord Ordinary.[2] There is perhaps an exception to this in the case of petitions under s. 57 of the Companies Clauses Consolidation (Scotland) Act, 1845.[3]

SECTION 3.—APPOINTMENT OF FACTOR.

SUBSECTION (1).—*Form of Petition.*

1026. The petition for appointment of a judicial factor whether presented in the Inner House, to any Lord Ordinary in the Outer House, or to the Junior Lord Ordinary, is addressed "Unto the Right Honourable The Lords of Council and Session," all these petitions being originally applications for the exercise of the *nobile officium*, and the Lord Ordinary only acting under statutory delegation of the Court's authority. The petitioner must be correctly named and designed. A mistake in this respect was, in a petition under the Presumption of Life Act, held sufficient to require the procedure to be commenced of new.[4]

1027. The narrative of the facts upon which the proceedings have been taken must be distinctly set forth in short paragraphs. The dates referred to should be noted on the margin. When reference is made to the original or a prior petition, the name of the petitioner and the date of presentation as well as the date of the appointment should be stated.[5] The narrative should specify so far as possible the property and securities forming the estate,[6] and the names of all the parties interested.[7] In the case of an appointment to a pupil or minor there should be inserted a definite statement of the age of the ward, and in the case of an insane person the duration of the malady and who has had the care of his estate and person meantime.[8]

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[1] *Boylan* v. *Hunter*, 1921, 1922 S.C. 80; *Sharp* v. *Pathhead Spinning Co.*, 1885, 12 R. 574; see also *Anderson* v. *Muirhead*, 1884, 11 R. 870.

[2] 20 & 21 Vict. c. 56, s. 10; 50 & 52 Vict. c. 54, s. 3; *Primrose* v. *Caledonian Rly. Co.*, 1851, 13 D. 1214; *Borthwick, Petr.*, 1862, 1 M. 104.

[3] *Broad* v. *Edinburgh Northern Tramways Co.*, 1888, 15 R. 615; *Glasgow, Garnkirk, and Coatbridge Rly.* v. *Caledonian Rly. Co.*, 1850, 12 D. 544, but see Judicial Factors (Scotland) Act, 1889, s. 14; Wilton, Company Law and Practice, p. 648.

[4] *Macallum*, 1883, 11 R. 60.

[5] *Scott, Petr.*, 1856, 18 D. 323.

[6] *Allan, Petr.*, 1852, 14 D. 486; *A. B.*, 1852, 14 D. 849.

[7] *Russell, Petr.*, 1855, 17 D. 312.

[8] Regulations, 5th December 1851, 1 Stuart 112; *Matthew, Petr.*, 1851, 14 D. 312.

1028. The petitioner may and generally does suggest a nominee for the office of factor, giving details of his fitness for the office.[1] Where alternative names have been submitted it has been held necessary, if the first-named declines to accept, that intimation should be made *de novo* to all concerned.[2] The Court never appoints factors in succession,[3] and only in special circumstances more than one person.[4] Combined applications for appointments of factors on different estates is discouraged,[5] but this does not apply to the appointment of factors *loco tutoris* or *curators bonis* to children of one family and similar cases. This exception has been extended to several families whose interests were alike.[6]

1029. Discrimination is necessary in the quotation of and reference to statutes. Generally it is not necessary to quote procedure sections, but sections which refer to the grounds and merits of the application should, as a rule, be quoted and not merely referred to.[7]

SUBSECTION (2).—*Intimation, Service, and Advertisement.*

1030. The prayer of the petition begins with the crave for intimation and service and, if appropriate, advertisement. "Intimation on the Walls and in the Minute-Book in common form" is a direction to post a copy of the petition and deliverance in the corridor of the Parliament House, and to see that a notice of the presentation of the petition is inserted in the printed Minute-Book of the Court of Session. The former is done by handing the document to the porter at the door, who affixes it to the wall. The entry in the Minute-Book is made by the clerk of Court. The Court will not supersede general intimation of a petition though all the parties interested consent.[8] If advertisement is ordered, which in these petitions is very unusual (except in petitions under s. 163 of the Bankruptcy (Scotland) Act, 1913, where advertisement in the *Edinburgh Gazette* is a statutory requisite), the newspapers selected will be mentioned.

1031. An order for service must be asked on all persons interested (other than the petitioners and consenters). It is the duty of the petitioner to set forth upon whom service should be made; it ought not to be left to the Court to determine this.[9] Where an appointment of a factor *loco tutoris* was made on the application of the mother, and the nearest agnate of the pupil child was not cited, the Court recalled the appointment as being outwith the power of the Court.[10] In the case

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[1] *Anderson*, 1854, 17 D. 97; *Broad* v. *Edinburgh Northern Tramways*, 1888, 15 R. 615.
[2] *Scouller*, 1834, 13 S. 101; *Thomson and Ors.*, 1851, 14 D. 311, but see para. 1036, *infra*.
[3] *Dow*, 1847, 9 D. 616; *Thomson*, *supra*. [4] *Sloan*, 1844, 7 D. 227.
[5] *Sutherland*, 1851, 13 D. 951; *Fleming*, 1850, 13 D. 951. [6] *Reid*, 1882, 19 S.L.R. 546.
[7] *Nicholson and Ors., Petrs.*, 1919, 1 S.L.T. 292; Duncan on Entails, p. 174.
[8] *Hutcheson*, 1847, 19 Sc. Jur. 347.
[9] *Duke of Northumberland*, 1854, 16 D. 803; *Lawson* (*Logan's J.F.*), 1894, 2 S.L.T. 308; cp. C.A.S., G, ii. Schedule I.
[10] *Fowlds*, 1836, 15 S. 244; *Gordon*, 1832, 11 S. 235; *Logan*, 1828, 6 S. 477; *Russell*, 1855, 17 D. 1005; *Lawson*, 1894, 2 S.L.T. 308.

of petitions for the appointment of *curators bonis* to insane persons the service must be personal on the alleged *incapax*. In very special circumstances the Court may dispense with service on an *incapax* upon a medical certificate stating that there would be danger to the *incapax* in serving the application upon him.[1] The certificate should specify the danger and give the medical practitioner's reasons for his opinion. In a case where the alleged *incapax* was resident in an asylum in South Africa, edictal citation alone was ordered,[2] and in a later case in similar circumstances service was dispensed with.[3] Where personal service is ordered upon a party outwith Scotland,[4] it may be made by anyone—a doctor, a solicitor or his clerk, or the matron at a hospital, in presence of a witness, and a certificate signed by the person serving the writ and the witness will be accepted as sufficient evidence of citation.

1032. Answers are usually ordered within eight days, whether the parties are within or furth of Scotland. In a petition under s. 163 of the Bankruptcy (Scotland) Act, 1913, the induciæ is fourteen days.[5] When edictal citation is to be made upon persons residing or carrying on business in England or Ireland, a copy of the writ and deliverance thereon should be sent by registered letter to such person at his known address as well as to the Keeper of Edictal Citations.[6]

1033. If an interim appointment pending the currency of intimation and service is required, it should be asked for immediately after the crave for service and answers. The facts calling for such an appointment must be set forth in the narrative of the petition.[7] In case of urgency an appointment will be made.[8] When such an appointment is made the entry in the Minute-Book is dispensed with.

Subsection (3).—*Sequestration of Estate.*

1034. If sequestration is required the crave should be inserted before the crave for appointment. In cases of partnership estates, and trust estates where the trust is not latent, sequestration must be asked.[9] Under the early procedure of the Court of Session it was by sequestration that the Court withdrew an estate from the hands of those who held it,[10] and thereafter appointed a factor to administer the estate under the authority of the Court. Sequestration confers on the factor no powers that he would not possess as factor,[11] and it is now resorted to only as a preliminary step to suspend during the subsistence of the factory the right and title of any person in whom the estate has been vested to intromit with or manage it.[12] Sequestration, while it takes the

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[1] *M'Kechnie*, 1890, 27 S.L.R. 261.
[2] *Allison*, 1901, 8 S.L.T. 339.
[3] *Buyers*, 1910, 2 S.L.T. 201.
[4] *Dalrymple* v. *Rankin*, 1836, 14 S. 1011.
[5] C.A.S., G, ii. 3.
[6] C.A.S., C, i. 6.
[7] *Cuthbertson* v. *Gibson*, 1887, 14 R. 736.
[8] *Kirk*, 1827, 5 S. 564; *Davidson*, 1830, 8 S. 1027; *Henderson*, 1830, 8 S. 1027; *Lyall*, 1843, 5 D. 1428; *Cuthbertson* v. *Gibson*, 1887, 14 R. 736.
[9] *Booth* v. *Mackinnon*, 1908, 15 S.L.T. 848.
[10] Thoms on Judicial Factors, p. 2.
[11] Thoms, p. 14; *Kay* v. *Cleugh*, 1840, 3 D. 252, per Lord Cunningham.
[12] *York Building Co.*, 1778, Mor. 8380; affd. 1779, 2 Paton 500; *Ferguson* v. *Murray*, 1853, 15 D. 682; *Booth* v. *Mackinnon*, 1908, 15 S.L.T. 848.

estate out of the power of the trustees or other holders, does not incapacitate them from acting *quoad ultra*.[1] In one case trustees were held entitled to exercise a discretion vested in them by the trust deed [2] in regard to the interests of grandchildren of the truster though a *curator bonis* had been appointed to them, and in another where a sole trustee had become bankrupt and refused to assume co-trustees the Court sequestrated the estate and appointed a factor, but later, on the trustee repenting and executing a deed of assumption, held that the sequestration and appointment should be recalled, and that thereupon the deed of assumption would come into operation.[3]

Subsection (4).—*Crave for Appointment.*

1035. Care should be taken in framing this part of the prayer to set forth clearly and definitely what is wanted, and the estate upon which an appointment is asked should be sufficiently identified, and not merely mentioned as "said estate." Alternative craves should be avoided if possible, and where they are necessary special care should be taken to see that they are framed with exactness. After the name of the person nominated by the petitioner the crave proceeds "or such other person as to your Lordships shall seem proper." Lord President M'Neill in a pronouncement urged the necessity of care in the drafting or revising of petitions by counsel, and referred to the laxity then existing (and still prevalent) in practice in this respect.[4]

1036. The prayer concludes with the crave "or to do further or otherwise in the premises as to your Lordships shall seem proper," an appropriate recognition of the supreme equitable jurisdiction of the Court.[5] Under this crave the Court is in practice to appoint a person other than the nominee of the petitioner without a new or amended petition and without further intimation and service.[6] The petition must be signed by counsel.[7]

Subsection (5).—*Expenses.*

1037. The crave should be for expenses out of the factory estate. It is not competent in petitions to grant expenses against non-compearing respondents, or out of estate which has not been brought under the control of the Court by the appointment of a judicial factor.[8] On special grounds expenses have been decerned for against respondents who were recipients of estate.[9]

Subsection (6).—*Who may Petition.*

1038. Generally anyone having an interest in the person or estate requiring protection may be petitioner. Thus the petitioner may be

[1] Thoms on Judicial Factors, p. 16. [2] *Cowan* v. *Crawford*, 1837, 15 S. 398, per Lord Moncreiff at pp. 404–5. [3] *Shedden*, 1867, 5 M. 955. [4] 18 D. 33.
[5] Thoms, p. 1. [6] *Davidson* v. *Boyle*, 1837, 15 S. 421.
[7] *Hay* v. *Perth Baking Co.*, 1823, 2 S. 7 107 (N.E. 101).
[8] *Mackie* (*Wallace's C.B.*), 1910, 1 S.L.T. 167.
[9] *Davidson's Trs.* v. *Simmons*, 1896, 23 R. 1117.

a minor with or without the consent of relatives for appointment of a *curator bonis* to himself;[1] an *incapax* who, although unable to manage his own affairs or direct their management, is able to appreciate the purpose of an application for appointment of a curator to him;[2] relatives of a pupil, absent person, or *incapax*;[3] relatives of a minor, but except in special circumstances no appointment will be made without minor's consent;[4] the law agent of an *incapax*;[5] a person with whom the *incapax* resided;[6] trustees,[7] creditors,[8] debtors;[9] heritors for a curator to a parochial schoolmaster;[10] a subfeuar for a factor *loco absentis* to his immediate superior in order to obtain completion of his title.[11] Judicial factors desirous of retiring and executors of deceased factors may apply for appointment of successors. The Accountant of Court may in certain cases apply for appointment of a judicial factor; the application takes the form of a report to the Lord Ordinary.[12]

Subsection (7).—*Who may be Appointed.*

1039. The Court will consider the qualifications of any person suggested in an application as a factor,[13] but it will not unnecessarily interfere with the appointment of the nominee of the petitioner.[14] If there is opposition on the part of any party having an interest it will, as a general rule, make an independent appointment. A bankrupt[15] or a person having an adverse interest[16] will not be appointed. The Court will, on cause shewn, appoint a person resident in the United Kingdom though outwith the jurisdiction of the Court, but requires, in such cases, a bond binding the factor to submit himself to the supervision of the Accountant of Court, and to prorogate the jurisdiction of the Court of Session for the purposes of the factory.[17] In a recent case reported by Lord Moncrieff to the First Division, a citizen of the United States of America, resident in New York, was appointed *curator bonis*

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[1] *Perry*, 1903, 10 S.L.T. 536; *Towton*, 1847, 10 D. 225; *Webster*, 1849, 12 D. 911; *Arnot*, 1850, 12 D. 912; *Irvine*, 1850, 12 D. 912; *Paterson*, 1850, 12 D. 912; *Reid*, 1839, 14 F.C. 1059; *Woodrow*, 1849, 11 D. 1494.

[2] *Swan* v. *Briggs*, 1853, 2 Stuart 284; *Mark*, 1845, 7 D. 882; *A. B.*, 1909, 16 S.L.T. 557.

[3] Maclaren, Bill Chamber Practice, p. 130, and cases there quoted.

[4] *Macdonald*, 1896, 4 S.L.T. 4; *Hutcheon*, 1909, 1 S.L.T. 71; *Perry*, 1903, 10 S.L.T. 536; *M'Nab*, 1871, 10 M. 248; *Bower*, 1750, Mor. 8910.

[5] *Hope*, 1850, 13 D. 951; *Mason*, 1852, 14 D. 761.

[6] *Macpherson*, 1850, 13 D. 950; *Bonar*, 1851, 14 D. 10.

[7] *Kirk*, 1836, 14 S. 814; *Viscountess Alford*, 1851, 13 D. 950.

[8] *Peterson & Co.*, 1851, 13 D. 850.

[9] *Lauder* v. *Lauder*, 1851, 14 D. 14.

[10] *Ross and Ors.*, 1851, 13 D. 950.

[11] *Lunan* v. *Macpherson*, 1927, S.L.T. 661.

[12] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39), s. 10.

[13] *Anderson*, 1854, 17 D. 97.

[14] *Brown* v. *Edinburgh Northern Tramways Co.*, 1888, 15 R. 615.

[15] *Fraser*, 1849, 11 D. 1029; *Miller*, 1849, 12 D. 912.

[16] *Raeburn and Ors.*, 1851, 14 D. 311.

[17] *Collins*, 1921, 2 S.L.T. 36; *Duff*, 1910, 2 S.L.T. 202; *Sim* v. *Robertson*, 1901, 3 F. 1027, but see *Napier*, 1902, 9 S.L.T. 439.

to his son, a minor, *quoad* the heritable estate in Scotland belonging to the son.[1]

1040. Formerly women, married or unmarried, though eligible for appointment, were seldom in practice appointed judicial factors, but now no objection is made to the appointment of a woman if she is qualified to perform the duties of the office.[2] A married woman could not formerly be appointed *curator bonis* to a minor,[3] but, since the passing of the Married Women's Property (Scotland) Act, 1920, by which the right of administration of the husband is wholly abolished, the objection would probably not be sustained.[4] A mother, after the death of her husband, is guardian to the pupil children of the marriage even though she may enter upon a second marriage.[5] A company cannot be appointed, though it may be liable for the intromissions of one of its partners who has been appointed judicial factor.[6] The appointment of a stepfather as factor *loco tutoris* has been looked upon with disfavour.[7] At one time the Court refused to appoint ministers of the Church of Scotland,[8] but now there would be no difficulty in making such an appointment.[9]

1041. The nearest agnate entitled to apply for appointment of tutor or curator at law may be appointed factor *loco tutoris* or *curator bonis*.[10] Formerly such an appointment was only made under the expressed condition that he would act gratuitously,[11] but it has been held incompetent to impose this condition *ex post facto*,[12] and now it is not usual to insist upon it.[13]

1042. The Court will only in special circumstances appoint more than one person factor,[14] and will in no case make an appointment of one person whom failing another.[15]

Subsection (8).—*Who may oppose Appointment.*

1043. All persons interested must be called, and it follows that any person interested may oppose an application for appointment. A person claiming interest, but upon whom the petition has not been served, may lodge and box answers in the same way as if he had been called, and may move the Court to allow the answers to be received,

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[1] *Ogilvy, Petr.*, for *Curator bonis*, 10th February 1927, see Minute-Book, 1926–7, pp. 179 and 190.

[2] *Duff*, 1910, S.L.T. 202

[3] *Chalmers' Trs.* v. *Sinclair*, 1897, 24 R. 1047.

[4] 10 & 11 Geo. V. c. 64; see Lord Kinnear's opinion in *Chalmers' Trs.* v. *Sinclair, supra.*

[5] Guardianship of Infants Acts, 1886 and 1925 (40 & 49 Vict. c. 27), s. 2 (15 & 16 Geo. V. c. 45), s. 4.

[6] *Macfarlane*, 13 S. 725.

[7] *Forbes*, 1832, 10 S. 289.

[8] *Thomson*, 1829, 8 S. 12; *Brodie*, 1867, 3 S.L.R. 223.

[9] *Pool and Ors.*, 1897, 4 S.L.T. 216.

[10] *Simpson* v. *Simpson*, 1891, 18 R. 1207, but see *Cameron*, 1850, 12 D. 912.

[11] *Jackson*, 1821, 1 S. 194, 203; *Robertson*, 1830, 8 S. 307, 435; *Jackson* v. *Wight*, 1835, 13 S. 961.

[12] *Macdonald* v. *Macdonald*, 1854, 16 D. 1023.

[13] *Accountant of Court* v. *Watt*, 1866, 4 M. 772.

[14] *Sloan*, 1844, 7 D. 227.

[15] *Dow*, 1847, 9 D. 616; *Thomson*, 1851, 14 D. 311.

or may lodge a minute craving to be allowed to lodge answers. The answers will be allowed if any reasonable interest can be shown.[1]

SUBSECTION (9).—*Opposition to Nominee alone.*

1044. If the compearing respondent does not dispute the facts stated in the petition, nor the necessity for the appointment of a factor, but merely desires to oppose the nominee of the petitioner, he does not require to lodge answers, but may appear by counsel at the Bar when the case is enrolled in the motion roll and state his objection. As a rule when such objection is stated the Court will not enter into a discussion of the qualifications of the nominees proposed, but will make an independent appointment. In some cases, however, where the interest of one party outweighs the interest of the other, or for other reasons, the Court may prefer one of the persons named. As has already been pointed out, a *curator bonis* to a minor will not be appointed without the minor's assent, unless in very exceptional circumstances.[2] In the case of an application of a subfeuar for appointment of a factor *loco absentis* to his immediate superior, the wife of the *absens* appeared to object to the nominee in the petition and she herself was appointed.[3] In another case preference was given to the nominee of a respondent, the only son of the *incapax*, over the nominee of the petitioner, her banker.[4] Should an *incapax* be in a condition to express an intelligent opinion upon the appointment of a curator to him, the Court will give consideration to his wishes.[5]

SUBSECTION (10).—*Caution.*

1045. Every judicial factor shall, within such time of his appointment as the Court shall direct, find caution for his duly accounting for his intromissions and management and observing and performing every duty incumbent upon him, as factor, in terms of the rules prescribed or to be prescribed for the discharge of his office, and in case of his failure to do so his appointment shall fall: and no factor shall enter upon the duties of his office, nor shall an extract of his appointment be issued, until after such caution is found and received as sufficient; and the factor shall extract his appointment without delay.[6] When not otherwise expressed in the interlocutors the time for finding caution shall be one calendar month from the date of the appointment, but the Court, on cause shewn, on application before the expiry of that period, may prorogate the time for finding caution.[7] The Court may limit the

[1] *Gas Power and By-Products Co.* v. *Power Gas Corporation*, 1911 S.C. 27.
[2] *Macdonald*, 1896, 4 S.L.T. 4; *Bower*, 1750, Mor. 8910.
[3] *Lunan* v. *Macpherson*, 1927 S.L.T. 661.
[4] *Johnstone* v. *Barbe*, 1928 S.N. 86.
[5] *Scott*, 1855, 17 D. 362; *Howden* v. *Archibald*, 1833, 11 S. 561; *Dick*, 1901, 9 S.L.T. 177.
[6] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 2.
[7] C.A.S., G, i. 2; *Harris*, 1901, 8 S.L.T. 415; *Cuthbertson*, 1905, 13 S.L.T. 205.

caution to be found by factors to a specified amount, and also authorise bonds or policies of guarantee companies approved by the Court to be accepted as sufficient.[1]

1046. On the appointment of a factor the process must forthwith be transmitted by the agent to the Accountant of Court in order that the matter of caution may be dealt with by him.[2] Where it is proposed that the caution be limited the Accountant of Court shall, after such inquiry as he thinks requisite, report on the proposed limitation to the Lord Ordinary, who may approve of or vary the limitation, and in the case of a guarantee company approve of the company proposed, and that without enrolment or motion, unless any party having interest shall have intimated to the clerk of the process that he desires to be heard.[3] The Accountant of Court shall, on being satisfied as to the form and due execution of the bond of caution, and as to the sufficiency of the cautioner, make a marking on the margin of the interlocutor sheet to the effect that caution has been received, adding his signature and the date, and such marking shall be an authority for extract of the appointment.[4]

1047. During the subsistence of a factory the Accountant of Court may, with the approval of the Lord Ordinary, which may be obtained without enrolment or motion, call upon the factor to increase the amount of the existing cautionary bond, or to find new or additional caution, or to procure a company bond in substitution for or in addition to that of an existing cautioner, and the Accountant may, with the like approval, authorise the factor to decrease the amount of the existing caution.[5]

1048. In January of each year the Accountant prepares and submits a list of approved guarantee companies for the consideration and approval of the Lord Ordinary.[6] In the event of a company whose name does not appear on this list being proposed as cautioner, a remit will be made by the Lord Ordinary, without enrolment or motion, to the Accountant to inquire and report upon the position of the company. On the Accountant's report the company's name may be added by the Lord Ordinary to the list of approved companies.

1049. The Accountant shall allow as against the factory estate (1) the premium on a company bond or such part thereof as he deems proper, and (2) the expense of obtaining the bond, but the fact of such charge shall be taken into account by the Accountant in fixing the factor's remuneration.[7]

Subsection (11).—*Acts of Factor before finding Caution.*

1050. The provision in the Pupils Protection Act and the Act of Sederunt that no factor shall be entitled to act until he has found

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[1] 12 & 13 Vict. c. 51, s. 27; C.A.S., G, i. 5 (*d*); *M'Kinnon, Petr.*, 1884, 11 R. 676.
[2] C.A.S., G, i. 5.
[3] *Ibid.*, 5 (*b*).
[4] *Ibid.*, 5 (*a*).
[5] *Ibid.*, 5 (*c*).
[6] *Ibid.*, 5 (*d*).
[7] *Ibid.*, 6.

caution and obtained extract does not have the effect of rendering absolutely nugatory every act which he may have performed between the date of his appointment and that of his obtaining extract. The purpose of the provision of the Act is to prevent a factor from taking possession of the estate of his ward before he has found caution, but that does not preclude him from doing any acts for the protection of his ward's interests, if an emergency should occur making immediate action on his part necessary.[1]

Subsection (12).—*Liability of Cautioner.*

1051. A cautioner is liable for a deficiency in the trust funds caused by the factor's intromissions prior to the date of the bond of caution.[2] Averments of fraud on the part of the factor, neglect of duty on the part of the Accountant of Court, and concealment by the beneficiaries of prior failure of duty by the factor, resulting in ignorance of material facts on the part of the cautioner, were held not relevant as a defence in an action against a cautioner to make good the factor's defalcations.[2]

Section 4.—Classes of Judicial Factors.

1052. Under this heading are noted matters that have to be kept in view in dealing with each different class of factor consequent on the peculiar nature of his office and duties.

Subsection (1).—*Factor* loco tutoris.

1053. A factor *loco tutoris* is appointed to administer the estate of a pupil who is without a tutor or guardian,[3] or where the tutor or guardian is for some reason not available for the office, as where he has been removed from office,[4] is incapacitated,[5] has adverse interests,[6] or is an undischarged bankrupt.[7] Mere poverty is not a sufficient reason for removing a tutor.[8]

1054. Under the Guardianship of Infants Acts the mother, on the death of the father, becomes guardian to her pupil children, either alone or jointly with any tutors nominated by the father. When no guardian has been appointed by the father, or if such guardian is dead or refuses to act, the Court may, if it thinks fit, appoint a guardian to act jointly with her.[9] Such an appointment may be made on petition to the

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[1] *Calne* v. *Howard Baker & Co.*, 1894, 22 R. 1, per the Lord Justice-Clerk at p. 4.
[2] *Wallace's J.F.* v. *M'Kissock*, 1898, 25 R. 642.
[3] *Davidson*, 1855, 17 D. 629; *Willison*, 1890, 18 R. 228.
[4] *Wight*, 1837, 15 S. 1197; *Viscountess Alford*, 1851, 13 D. 950; *Ross*, 1857, 19 D. 699; *Lamb*, 1858, 20 D. 1323; cf. *Lamb*, 1857, 19 D. 699.
[5] *Munnoch*, 1837, 15 S. 1267; *Macintyre*, 1850, 13 D. 951.
[6] *Mann*, 1851, 14 D. 12; *Balfour Melville*, 1903, 5 F. 347; *Cochrane*, 1891, 18 R. 456.
[7] *Johnstone* v. *Wilson*, 1822, 1 S. 558 (N.E. 510); *Allan*, 1895, 3 S.L.T. 87.
[8] *Wardrop* v. *Gossling*, 1869, 7 M. 532.
[9] 15 & 16 Geo. V. c. 45, s. 4 (1).

Junior Lord Ordinary.[1] The Court has refused to allow a mother, a guardian under these Acts, to renounce her guardianship and to be appointed factor *loco tutoris* to her pupil children,[2] but on her renouncing her guardianship so far as the management of the pupils' estate is concerned a factor *loco tutoris* has been appointed on her petition.[3]

1055. Intimation of the application for appointment must be made to the pupil's two nearest agnates and two nearest cognates unless they are petitioners.[4] The Court may on cause shewn dispense with service on the relatives of the pupil. Mr Maclaren in his work on Bill Chamber Practice appears to say that this can only be done in the Inner House, but the case he quotes is dated 1848, before the date of the Distribution of Business Act, 1857, and there seems no reason why such an order should not be granted by the Junior Lord Ordinary in the process for appointment.[5]

Subsection (2).—Curator bonis *to a Minor.*

1056. A factor *loco tutoris* becomes *ipso facto* a *curator bonis* on the ward attaining minority.[6] Formerly the Court was averse to appointing a *curator bonis* to a minor, he being entitled to choose his own curators in an action of choosing of curators, but the practice of proceeding by petition for appointment has become general, and the simple and summary nature of the proceeding has led to its adoption in preference to the more cumbrous and expensive action. A *curator bonis* may be appointed to a minor domiciled abroad having property heritable or moveable in Scotland, provided as regards the moveable estate no guardian has been appointed by the Court of his domicile.[7] The Court will appoint a *curator bonis* to a domiciled Scot residing abroad.[8] "It is a question whether and how far the common law power and rights of a minor having a *curator bonis* are restrained as compared with those of a minor who has chosen curators for himself."[9] Special powers cannot be conferred on the minor, and the practice is to confer these powers on the *curator bonis* under s. 7 of the Pupils Protection Act, 1849.[10] Service should be made on the nearest agnates and cognates of the minor as in the case of the appointment of a factor *loco tutoris.*

1057. Though the Court will not, except in special circumstances, interfere in controlling the rights and authority of a father over his

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[1] *Craig, Petr.*, 2nd November 1928, unreported; Minute-Book, 1928–9, p. 29.
[2] *Willison*, 1890, 18 R. 228.
[3] *Young, Petr.*, 23rd November 1928, unreported; Minute-Book, 1928–9, p. 54.
[4] *Cowan*, 1788 Mor. 7452; *Logan*, 1828, 6 S. 477.
[5] Maclaren, Bill Chamber Practice, p. 123; *Carmichael*, 1848, 10 D. 1286; 20 & 21 Vict. c. 56, s. 4.
[6] Judicial Factors Act, 1889, 52 & 53 Vict. c. 39, s. 11.
[7] *Buchan* v. *Harvey*, 1839, 2 D. 275; *Lamb*, 1858, 20 D. 1323; *Sawyer* v. *Sloan*, 1875, 3 R. 271, per Lord Pres. Inglis at p. 272.
[8] *Duffie*, 1910, 2 S.L.T. 202; *Ogilvy*, 10th February 1927, Minute-Book, 1926–7, pp. 179 and 190.
[9] Burns, Conveyancing, p. 303; *King's Trs.* v. *M'Lay*, 1901, 8 S.L.T. 413; *Perry*, 1903, 10 S.L.T. 1536.
[10] *Maconochie*, 19 D. 371, at p. 372; *Perry, supra.*

children, it will, when the interest of a child demands it, appoint a *curator bonis* to supersede the father in the management of the child's estate.[1]

SUBSECTION (3).—Curator bonis *to* Incapax.

1058. The origin and nature of this appointment are dealt with in the opinions of the judges of the Court of Session given on remit by the House of Lords in the case of *Bryce* v. *Graham*.[2] Incapacity may be mental or physical.

(i) *Mental Incapacity.*

1059. Two medical certificates should be lodged along with the petition,[3] and printed as an appendix or schedule to the petition.[4] The certificates must be on soul and conscience,[5] and must be given by the medical practitioners independently of each other.[6] The certificate of a medical officer connected with the asylum in which the *incapax* is resident will be accepted along with one by a doctor not connected with it.[7] The certificates must be of recent date, and should state the date when the *incapax* was examined.[8] They should bear that the *incapax* is a person of unsound mind and unable to manage his own affairs or to give instructions for their management.[9] In the case of a petition at the instance of the *incapax* himself the certificates must state that while he is incapable of managing or giving directions for the management of his affairs he is still capable of understanding the purpose of the application. A form of such certificate was approved by Lord Skerrington in one case.[10]

1060. In a case where the certificates bore that a lady was in such a state of mind that if left to herself she would be very apt to be misled both in regard to her own conduct and to the management of her affairs a curator was appointed.[11] On the other hand, where a person laboured under an insane delusion that did not affect his capacity to manage his affairs the Court refused to make an appointment.[12] It was observed in the latter case that a curator is appointed for the protection of the interests of the person whose estate is in danger of being dilapidated, and not of his relations, and that if his own interest is not in danger there is no ground for the appointment. This case should be compared with the later case of *A. B.* v. *C. B.*,[13] where a *curator bonis* was appointed.

1061. Where the alleged *incapax* refuses to submit to examination and relevant averments are made in the petition for appointment, it

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[1] *M'Nab* v. *M'Nab*, 1871, 10 R. 248; *Boylan* v. *Hunter*, 1922 S.C. 80.
[2] 1828, 6 S. 425; affd. 1828, 3 W. & S. 323. [3] *Robertson*, 1853, 16 D. 317.
[4] *Kenmore*, 1849, 11 D. 1494; *Wright*, 1849, 12 D. 912.
[5] *Campbell*, 1830, 8 S. 307 n. [6] *Knox*, 1894, 2 S.L.T. 388.
[7] *Kennedy*, 1901, 8 S.L.T. 415. [8] *Lord Advocate*, 1860, 22 D. 555.
[9] *Laidlaw*, 1846, 8 D. 426; Antonio, Bill Chamber Practice, p. 98.
[10] *A. B.*, 1908, 16 S.L.T. 557. [11] *Speirs*, 1851, 14 D. 11.
[12] *Forsyth*, 1862, 24 D. 1435.
[13] *A. B.* v. *C. B.*, 1890, 18 R. 90; affd. 1891, 18 R. (H.L.) 40.

will be entertained without certificates, and a remit made to one or more mental specialists selected by the Court to examine him and to report.[1] The production of certificates supporting the alleged *incapax's* plea of sanity will not necessarily exclude further inquiry.[2]

1062. Where the necessity for the appointment of a *curator bonis* is contested answers must be lodged, and it is usual to produce along with them two medical certificates certifying the capacity of the alleged *incapax* to transact his own affairs. The answers of an alleged *incapax* must be considered.[3] He is not entitled to demand cognition or a formal judicial inquiry at which witnesses shall be examined on oath, with an opportunity for cross examination, before the appointment is made. The Court is entitled to adopt what course it considers best to obtain the information necessary and, if it sees fit, to proceed on the reports of medical men.[4] The almost invariable procedure is to remit to a medical specialist to report, but in one case Lord Ormidale allowed a proof. The petitioners abandoned their case after the examination of the alleged *incapax*.[5] In earlier cases it was not unusual to remit to a Sheriff to take evidence and report.[6]

(ii) *Physical Incapacity.*

1063. Mere physical weakness is not a sufficient ground for appointing a *curator bonis*; it must be of such a nature and degree as to render it impossible for the person to conduct his own affairs or give instructions for their management.[7] Doubt has been expressed whether in the case of physical disability the appointment made should be of a judicial factor. In the case of *Mark*,[8] the Court appointed a judicial factor to a man both deaf and blind, who could only communicate through the medium of touch, but was perfectly intelligent. A *curator bonis* was appointed in 1915 in a case of physical incapacity.[9] There has been diversity of practice both before and since that date, but recent practice seems to be in favour of the appointment of a *curator bonis*.[10] Medical certificates should be lodged and printed as in the case of mental incapacity.

Subsection (4).—*Factor* loco absentis.

1064. A factor *loco absentis* is appointed to manage the estate of a person furth of Scotland, for the benefit of the absentee or of third

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[1] *Greig and Ors.*, 1923, S.L.T. 434; *Davies*, 1928, S.L.T. 142, and case of *Coats* therein referred to; cp. *Calderwood* v. *Duncan*, 1907, 14 S.L.T. 777.

[2] *Davies, supra.*

[3] *Alston*, 1895, 23 R. 16.

[4] *A. B.* v. *C. B.*, 1890, 18 R. 90; affd. 1891, 18 R. (H.L.) 40; *Allan* v. *Groumeyer*, 1891, 18 R. 784.

[5] *Paxton and Ors.*, 1911, unreported. .

[6] *Dewar* v. *Dewar*, 1866, 12 S. 315.

[7] *Dowie* v. *Hagarts*, 1894, 21 R. 1052, per Lord Adam at p. 1055; *Mackie*, 1866, 5 M. 60.

[8] *Mark*, 1845, 7 D. 882.

[9] *Duncan*, 1915, 2 S.L.T. 50.

[10] *Accountant of Court* v. *Morrison*, 1857, 19 D. 504.

parties, or both.[1] The absentee must be known or presumed to be alive,[2] and he must have left no mandate or authority for the management of his estate.[3] The absentee must be ignorant of the existence of his rights, or at least of their unprotected condition,[4] or the interests of third parties must have intervened.[5] When the absentee returns,[6] or grants a mandate to some person to act for him,[7] or dies,[8] the factory falls. It is necessary, however, that the factory should be recalled in order to fix a date down to which the factor's intromissions are to be accounted for, and the factor discharged.[9]

1065. Where an *absens*, to whom a factor *loco absentis* had been appointed, returned from abroad temporarily, and an application was made for the continuance of the factory on his leaving the country again, the crave was refused.[10] Where the heir of an intestate had been absent from the country for thirteen years, and his place of abode was unknown, a judicial factor on the intestate estate was appointed in preference to a factor *loco absentis* to the absent heir.[11]

Subsection (5).—*Judicial Factor on Trust Estate.*

1066. The trust machinery must fail before the appointment of a judicial factor will be made.[12] In making the appointment it is not necessary that the Court should be satisfied regarding the validity of the trust.[13] The appointment of a factor has been refused where provision was made under the trust deed for the assumption or nomination of new trustees,[14] and this has been applied to the case of marriage contracts where the parties to the contract were still in life and assumed to have a reversionary right to appoint new trustees.[15] Where testamentary trustees confirmed subsequently to the presentation of a petition for the appointment of a factor the petition was dismissed. These cases were applications under the Bankruptcy Act, 1856, s. 164, but the rule applies equally to applications at common law.[16]

1067. A petition by a beneficiary, who had certain unascertained rights under a will and was in a position to claim legitim, for appointment of a factor to hold the estate and to enable her to ascertain her

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[1] Thoms on Judicial Factors, p. 159; *Lunan* v. *Macpherson*, 1927 S.L.T. 661.
[2] *Kennedy* v. *Maclean*, 1851, 13 D. 705; *White* v. *Stevenson*, 1829, 7 S. 555.
[3] *Steel*, 1874, 11 S.L.R. 160. [4] *Stuart*, 1708, M. 7455. [5] Thoms, p. 160.
[6] *Mackenzie*, 1845, 7 D. 361. [7] *Grant* v. *Cameron*, 1835, 13 S. 966, at p. 971.
[8] *Muller* v. *Wardrop*, 1846, 18 Sc. Jur. 540.
[9] *Craig* v. *Accountant of Court*, 1907, 15 S.L.T. 645.
[10] *Gowans*, 1917, 2 S.L.T. 61. [11] *Gibson*, 1882, 19 S.L.R. 605.
[12] Thoms, p. 23; M'Laren on Wills, vol. ii. p. 1270 *et seq.*; *Littlejohn*, 1832, 11 S. 217; revd. 1834, 7 W. & S. 380; *Sheriff* v. *Burnett*, 1829, 7 S. 314; *Shaw*, 1842, 4 D. 762; *Melville*, 1856, 18 D. 788; *Shaw*, 1862, 24 D. 849.
[13] *Soutar*, 1852, 15 D. 89, at p. 93.
[14] *Littlejohn*, 1832, 11 S. 217, revd. 1834, 7 W. & S. 380.
[15] *Lindsay* v. *Lindsay*, 1847, 9 D. 1297; *Tovey* v. *Tennant*, 1854, 16 D. 866; M'Laren on Wills, 3rd ed., vol. ii. p. 1274.
[16] *London and Brazilian Bank Ltd.* v. *Lumsden's Trs.*, 1913, 1 S.L.T. 262; *Curle* (*Curle's Trs.*), 1893, 1 S.L.T. 340.

rights was refused.[1] Where heritable estate was conveyed directly to beneficiaries, some of whom were abroad and their places of residence unknown, the estate was sequestrated and a factor appointed.[2] In the *Orr Ewing* case the trustees were in the position of being unable to obey conflicting orders of the Courts of England and Scotland; the Court of Session, the *forum domicilii*, sequestrated the estate and appointed a judicial factor.[3] A testator had authorised his trustees to allow any sums in the hands of his children to remain with them at interest. One of two sons, who were two out of five trustees, became bankrupt. Certain beneficiaries presented a petition alleging that the funds in the hands of the other son were imperilled. The Court refused the petition.[4]

1068. When circumstances call for it the Court will appoint a judicial factor to protect a contingent interest,[5] and this may be done on the petition of a person having only a contingent interest in a charitable trust.[6] Six judicial factors were appointed on six legacies falling to a trust for behoof of legatees—liferenters—to enable separate claims to be lodged in a multiplepoinding in which the legatees had conflicting interests.[7]

1069. Disagreement between trustees not involving a deadlock is not a sufficient ground for sequestrating a trust estate and appointing a factor.[8] Adverse interest on the part of a trustee may justify sequestration and appointment, but the fact of a trustee having a claim against or being indebted to the estate is no ground in itself for superseding him.[9] Where disagreement arose not between trustees but between the fiar of an estate who had become sole trustee and the liferentrix the Court removed the trustee and appointed a factor.[10] Where the majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate the Court, on the petition of certain of the next of kin, including a minority of the executors, sequestrated the estate and appointed a factor.[11]

1070. Breach of trust is a good ground for removal of a trustee or sequestration of the trust estate and appointment of a judicial factor.[12] But where it was sought on this plea to have a trustee removed because he had paid a claim without satisfying himself that it was sufficiently

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[1] *Williamson*, 1900, 8 S.L.T. 195. [2] *Doig*, 1882, 20 S.L.R. 210.
[3] *Orr Ewing* v. *Orr Ewing's Trs.*, 1884, 11 R. 600 and 682; 1885, 13 R. (H.L.) 1.
[4] *Dryburgh* v. *Walker's Trs.*, 1873, 1 R. 31; cf. *Carmichael* v. *Barber*, 1895, 23 R. 90.
[5] *Raes* v. *Meek*, 1889, 16 R. (H.L.) 30. [6] *Carmont*, 1883, 10 R. 829.
[7] *Govan* v. *Maitland*, 1903, 11 S.L.T. 78.
[8] M'Laren on Wills, vol. ii. p. 1277; *Allan*, 1898, 36 S.L.R. 350; 6 S.L.T. 152; *Hope* v. *Hope*, 1884, 12 R. 27; *Stewart* v. *Morrison*, 1892, 19 R. 1009; *Yuill* v. *Ross*, 1900, 3 F. 96; *Dick*, 1899, 2 F. 316; *Scott*, 1905, 13 S.L.T. 589; Menzies on Trustees, p. 194.
[9] *Bannerman*, 1895, 3 S.L.T. 208; *Young*, 1901, 9 S.L.T. 20.
[10] *Henderson*, 1893, 20 R. 536. [11] *Birnie* v. *Christie*, 1891, 19 R. 334.
[12] M'Laren on Wills, vol. ii. pp. 1275–6; *Gilchrist's Trs.* v. *Dick*, 1883, 11 R. 22; *M'Whirter* v. *Latta*, 1889, 17 R. 68; *Bowman* v. *Russell's Trs.*, 1891, 19 R. 205; *Henderson*, 1901, 9 S.L.T. 16.

vouched, but *mala fides* was not alleged, the petition was refused;[1] and again where a trustee had invested the trust funds in business and kept no sederunt book and trust accounts, but had acted in good faith and produced a benefit to the trust, the Court refused the petition.[2] Removal of the estate or part of the estate from the jurisdiction of the Scottish Court may be a ground for sequestration and appointment.[3]

1071. It is competent under the Trusts Acts, where under any conveyance any property is conveyed to one person in liferent and in fee to persons who, when the conveyance comes into operation, are unborn or incapable of ascertainment, on the application of the liferenter or of any person to whom the fee or any part thereof bears to be presumptively destined, or who may have an interest under such conveyance, or of the Accountant of Court, for the Court to appoint a trustee or trustees . . . or a judicial factor to hold the said property in trust in place of the liferenter or fiduciary fiar. For the purposes of such an appointment all references in the statute to a trust deed shall be read and construed as a reference to the conveyance of the property in liferent and fee.[4]

Subsection (6).—*Judicial Factor on Intestate Estate.*

1072. A factor will not be appointed on an intestate estate where the next of kin or other person entitled to confirm as executor is prepared to do so.[5] Lord Pearson made an appointment in an application under s. 164 of the Bankruptcy (Scotland) Act, 1856, where an executor dative had been confirmed, on the ground that there existed conflict of interest between the executor, who had a personal claim against the estate, which would if admitted render the estate insolvent, and the other creditors of the deceased.[6] Where an appointment of a factor had been made on an intestate estate, and a brother of the deceased returned temporarily from abroad, confirmed as executor dative, and presented a petition for recall, the recall was refused, the executor having, while the application was pending, returned to America.[7]

1073. While the Court will not appoint a judicial factor on funds in the hands of the King's and Lord Treasurer's Remembrancer,[8] it has declined to dismiss a petition for a factor on the estate of a deceased, on the ground that the petitioner, a law agent, had no interest, that the heirs of the deceased were unascertained, and that the Remembrancer was prepared to administer the estate.[9]

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[1] *Harris* v. *Howie's Tr.*, 1893, 21 R. 16. [2] *Gilchrist Trs.* v. *Dick*, 1883, 11 R. 22.

[3] *Orr Ewing* v. *Orr Ewing's Trs.*, 1885, 13 R. (H.L.) 1; *Bowman* v. *Russell*, 1891, 19 R. 205.

[4] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 8 (2) and (3).

[5] Bell's Prin., s. 1894 n.; M'Laren on Wills, 3rd ed., vol. ii. p. 1274; *Begg & Co.*, 1893, 1 S.L.T. 281; A.S., 13th February 1730, s. 7.

[6] *Lamb*, 1892, 9 S.L.T. 438. [7] *Masterton*, 1887, 14 R. 712.

[8] *Rankin*, 1896, 4 S.L.T. 186; *Baird* v. *King's and Lord Treasurer's Remembrancer*, 1904, 11 S.L.T. 569.

[9] *Handyside* v. *Lord Advocate*, 1909, 1 S.L.T. 268; *Murray* v. *Lord Advocate*, 1916, 1 S.L.T. 44.

SUBSECTION (7).—*Judicial Factor on Estate sequestrated under Bankruptcy Statutes.*

1074. The trustee on an estate sequestrated under the bankruptcy statutes having died before the whole estate was divided, and a meeting of creditors, ordered by the Court, to elect a new trustee having proved abortive through failure of any creditor to attend, the First Division, on the report of the Junior Lord Ordinary, appointed a judicial factor upon the sequestrated estate.[1] The appointment of a judicial factor on a sequestrated estate, where the sequestration had been sisted, after the appointment of the trustee, pending the carrying through of a deed of arrangement, has been held incompetent.[2]

SUBSECTION (8).—*Judicial Factor on Partnership Estate.*

1075. In *Young* v. *Collins & Feely*,[3] Lord Chancellor Cranworth quoted with approval Lord Cockburn's opinion in dissenting from the judgment in the Court of Session: "When a partner dies, a right to wind up the partnership concern is by law vested in the surviving partners. This is a right unquestionably, which, like all other things, is liable to be abused, and the Court may be called upon to interfere with the surviving and legal winder up; but then a case of abuse must be, at least, stated against him, why the winding up should be taken out of his hands." In *Dickie* v. *Mitchell*,[4] Lord President Inglis adopted this statement of the law,[5] and dealt with the circumstances in which the Court will appoint and will not appoint a judicial factor upon a partnership estate as follows: (1) Where all the partners in a copartnership are dead the Court will appoint a judicial factor to wind up the partnership estate;[6] (2) if there is a surviving partner or partners, and no fault or incapacity to prevent him or them carrying on the business, the Court will not interfere;[3] (3) if there are surviving partners but they are by fault or incapacity unfitted for carrying on the business of the copartnery, then the Court can and, if satisfied of the necessity, will appoint a judicial factor.

1076. Procedure by petition under s. 35 of the Partnership Act, 1890, is not competent where the parties are at variance regarding questions of accounting or other matters requiring investigation and inquiry.[7] A petition for dissolution of partnership and appointment of a factor by three out of four partners was refused in the following circumstances: M., the sole partner in a long-established manufacturing business, entered into partnership with three younger men, who undertook to

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[1] *Moncreiff's Trs.* v. *Hally*, 1899, 1 F. 698.
[2] *Brown* v. *Bayley's Trs.*, 1910 S.C. 76.
[3] *Young* v. *Collins & Feely*, 1853, 15 D. (H.L.) 35, reversing Second Division, 14 D. 540.
[4] 1874, 1 R. 1030.
[5] *Dickie* v. *Mitchell*, 1874, 1 R. 1030.
[6] *Dixon* v. *Dixon*, 1831, 10 S. 178; affd. 1832, 6 W.S. 229.
[7] *Wallace* v. *Whitelaw*, 1900, 2 F. 675; *Logan* v. *Cunningham*, 1903, 41 S.L.R. 23; *M'Nabs* v. *M'Nabs*, 1912 S.C. 421; *Gow* v. *Schultze*, 1877, 4 R. 928; *Elliot* v. *Cassells & Co.*, 1907, 15 S.L.T. 190.

give personal attention to the business. M. was to provide capital, and was to sign cheques, endorse bills, etc., and provision was made for this being done by the others in case of his indisposition. M. became incapacitated by a stroke of paralysis. The three junior partners presented a petition for dissolution. The petition was refused on the ground that it was not a condition of the partnership that M. was to give personal service.[1] Where a contract of copartnership provided that on dissolution the business should be wound up by one of the partners named, and two years after the dissolution his copartners brought a petition on the ground that he was carrying on the business as a going concern, the Court after report by an accountant appointed a factor.[2] On the petition of three out of four partners alleging misconduct on the part of the fourth partner an order for dissolution was granted and a factor appointed.[3]

SUBSECTION (9).—*Judicial Factor pending Litigation.*

1077. The Court will not readily interfere with the possession of estate pending litigation, especially where there has been acquiescence on the part of the person challenging possession. A petition at the instance of the pursuer in an action of declarator of invalidity of an entail against a substitute heir of tailzie who had expede a service in that character was refused.[4] The manager of a business for testamentary trustees raised an action against the trustees to have it declared that the business had been sold to him by them. The Lord Ordinary held that the sale had not been proved. Before a reclaiming note for the pursuer was disposed of the trustees presented a note in the process craving the Court to ordain the pursuer to give access to the premises and to the books to an accountant, in order that he might inspect the same and take such action as might be necessary to protect the interests of the trust estate. The Court refused the note on the ground that the trustees had acquiesced in the management for a considerable time, and that no ground was alleged for interfering with the interim possession.[5]

1078. In a competition between the testamentary disponee and the next of kin of a lunatic, neither party being in possession, but the disponee having recorded his disposition in the Register of Sasines, a judicial factor was appointed;[6] and this was also done in an application, pending an action of reduction of a will, the sole trustee and executor not having taken out confirmation or made up title to the heritage.[7]

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[1] *Eadie* v. *MacBean's Curator bonis*, 1885, 12 R. 660.

[2] *Allan* v. *Groumeyer*, 1891, 18 R. 784.

[3] *Macpherson*, 1869, 6 S.L.R. 348.

[4] *Cotton* v. *Mackenzie*, 1870, 8 M. 713; *Padwick* v. *Stewart*, 1871, 9 M. 793; *Borthwick* v. *Glassford*, 1861, 23 D. 632; see also *Marshall* v. *Graham*, 1857, 21 D. 203; *Finlay* v. *Dymock*, 1854, 16 D. 868; *Cunningham* v. *Dickson*, 1839, 1 D. 362.

[5] *Boak* v. *Boak's Trs.*, 1872, 10 M. 822.

[6] *Molleson* (*Pattison's Curator bonis*), 1898, 35 S.L.R. 660; 5 S.L.T. 400.

[7] *Blackwood* v. *Reith*, 1905, 13 S.L.T. 629; *Simpson's Exr.* v. *Simpson's Trs.*, 1912 S.C. 418.

A trust disposition and settlement conveyed entailed lands in fee simple to trustees with instructions to take infeftment before the funeral of the grantee; an action of reduction was raised by the heir under the entail; it was held that the infeftment of the trustees and the possession thereon did not create such a change in possession as to entitle them to retain it, and the estate was sequestrated and a factor appointed.[1]

SUBSECTION (10).—*Sequestration and Appointment of Judicial Factor for enforcing Jurisdiction.*

1079. Sequestration and appointment of a factor have been resorted to as a means of enforcing the jurisdiction of the Court. A father obtained an order for the custody of his child against an aunt of the child. The aunt failed to implement the order, and upon a second petition by the father, praying that she be ordained to appear in Court or for sequestration of her estate and appointment of a factor thereon, sequestration was granted and a factor appointed. Later, on a petition of the aunt, the sequestration and appointment were recalled.[2]

SUBSECTION (11).—*Judicial Factor under the Bankruptcy Act, s.* 163.

1080. Sec. 163 of the Bankruptcy (Scotland) Act, 1913,[3] repeats with certain amendments s. 164 of the Bankruptcy (Scotland) Act, 1856:[4] "It shall be competent to one or more creditors of parties deceased, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court of Session or, where the assets of the deceased are estimated not to exceed five hundred pounds, to the Sheriff of the sheriffdom within which the deceased resided or carried on business during the year immediately preceding the date of the petition, or within which heritage belonging to the deceased at the time of his death is situated, for the appointment of a judicial factor, and after such intimation of the petition to the creditors of the deceased, and other persons interested, as may be considered necessary, and after hearing parties, the Lord Ordinary or Sheriff may appoint such factor, who shall administer the estate subject to the supervision of the Accountant in accordance with the Judicial Factors (Scotland) Acts, 1880[5] and 1889,[6] and relative Acts of Sederunt, and in case of an insolvent estate shall divide the same among the creditors thereof in accordance with the rules as to ranking obtaining in sequestrations in virtue of the provisions of this Act." Sec. 164 gives the Court power

[1] *Speirs* v. *Speirs*, 1877, 5 R. 75; *Elliot* v. *Scott*, 1843, 5 D. 1075.
[2] *Edgar* v. *Fisher*, 1893, 21 R. 59; *Fisher* v. *Edgar*, 1894, 21 R. 1076; *Ross* v. *Ross*, 1885, 12 R. 1351.
[3] 3 & 4 Geo. V. c. 20, s. 163.
[4] 19 & 20 Vict. c. 76, s. 164.
[5] 43 & 44 Vict. c. 4.
[6] 52 & 53 Vict. c. 39.

by Act of Sederunt to regulate the procedure, repeating s. 165 of the older Act. This power was exercised, and the rules are set forth in C.A.S., G, ii., to which reference is made. A form of petition is given in the Schedule appended to the Act of Sederunt.

1081. The principal points to be kept in mind are: (1) The creditors of the deceased should be mentioned in the narrative of the petition in so far as known to the petitioner.[1] (2) Intimation must be made in the *Edinburgh Gazette* in addition to the intimation on the Walls and in the Minute-Book,[2] and the appointment of a factor shall not be made until the lapse of fourteen days after intimation and service.[3] (3) Within eight days after extracting his appointment the factor shall insert in the *Edinburgh Gazette* and in such newspapers as may appear to him proper a notice of his appointment, and calling for claims.[4] (4) The factor shall within six months from the date of extract of his appointment lodge with the Accountant of Court a full inventory of the estate.[5] (5) A state of funds and scheme of division shall be laid before the Accountant, and the Accountant shall make a report thereon.[6] (6) This state of funds and scheme of division and the Accountant's report shall be lodged in Court, and the factor shall transmit to each person who has lodged a claim a notice by post intimating that this has been done, and stating the amount for which the creditor has been ranked, and whether his claim is to be paid in full or by a dividend, and the amount thereof, and in case of claims rejected stating that fact, and a notice shall also be inserted in the *Edinburgh Gazette*. The factor shall give notice by letter to any other parties mentioned in the petition or in the books or papers of the deceased as creditors, or who, he may have reason to believe, have claims against the estate.[7] (7) The state of funds and scheme of division lie in the hands of the clerk of Court for three weeks, during which time creditors and others interested in the succession of the deceased may examine them, and if so advised lodge objections in the form of a note signed by counsel.[8] (8) On the expiry of this period and on the scheme of division being adjusted (where objection has been taken and adjustment found necessary), the Court approves of the scheme and authorises distribution in accordance therewith.[9] (9) Partial dividends may be approved and paid.[10] (10) In the event of there being a surplus after payment of creditors the factor shall report thereon to the Accountant, and on the Accountant's report the Lord Ordinary shall grant an order for payment to the parties entitled thereto.[11] (11) When applying to the Court for his discharge the factor shall intimate the petition to the representatives of the deceased and insert a notice thereof in the *Edinburgh Gazette*, and the petition shall not be disposed of until fourteen days after such insertion.[12]

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[1] C.A.S., G, ii., Schedule I. [2] *Ibid.*, s. 2, Schedule II.
[3] *Ibid.*, s. 3. [4] *Ibid.*, s. 4, Schedule III. [5] *Ibid.*, s. 6.
[6] *Ibid.*, s. 7. [7] *Ibid.*, s. 8., Schedule IV. [8] *Ibid.*, s. 9.
[9] *Ibid.*, ss. 10 and 11. [10] *Ibid.*, s. 12. [11] *Ibid.*, s. 14.
[12] *Ibid.*, s. 15, Schedule V. For cases under this section see paras. 1066 and 1077, *supra*.

The Act of Sederunt framed in terms of the Bankruptcy (Scotland) Act, 1856, was applied to the Act of 1913 by Act of Sederunt of 6th January 1914.

SUBSECTION (12).—*Interim Factor under the Bankruptcy Act, s. 14.*

1082. This appointment is made by the Lord Ordinary officiating on the Bills only as ancillary to a petition for sequestration of an estate under the Bankruptcy (Scotland) Act, 1913, and is for the purpose of preserving the estate until a trustee has been elected and confirmed thereon. The crave for appointment may be contained in the petition for sequestration, or in a separate application to the Court before which the petition for sequestration is pending, and it may be disposed of with or without intimation to the parties interested. The appointment carries the powers necessary for the preservation of the estate, including the power to recover debts. The facts calling for an appointment should be set forth in the petition, and the appointment should never be made as a matter of course.[1] In a case where such an appointment was made upon the estate of a deceased, upon which a trustee could not be elected and confirmed for four months, the Junior Lord Ordinary, in a petition presented to him for a judicial factor under s. 164 of the Bankruptcy (Scotland) Act, 1856, made an appointment in order that the estate might be immediately realised.[2] An appointment or order made by the Sheriff under this section may be recalled by the Court of Session on appeal.[3] Upon handing over the estate to the trustee in the sequestration the factor will be exonered and discharged by the Court.[4]

SUBSECTION (13).—*Companies and Railways.*

1083. The Companies Clauses Consolidation (Scotland) Act, 1845,[5] s. 40, empowers companies entitled to borrow on mortgage to grant mortgages on "the undertaking." Sec. 56 provides for the appointment of a judicial factor where by the special Act incorporating the company the mortgagees are empowered to enforce payment of their arrears of interest by appointment of a judicial factor. Sec. 57 provides that every application in the cases foresaid shall be made to the Court of Session . . . and it shall be lawful for the said Court . . . to appoint some person to receive the whole or a competent part of the tolls on sums liable to the payment of such interest or such principal and interest as the case may be . . . until the same be fully paid . . . and after such interest and costs or such principal interest and costs have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions. . . . The application is made to the Junior Lord Ordinary.[6]

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[1] *Cuthbertson* v. *Gibson*, 1887, 14 R. 736. [2] *Youngson*, 1911, 2 S.L.T. 448.
[3] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 14.
[4] Goudy on Bankruptcy, 4th ed., p. 156. [5] 8 & 9 Vict. c. 17, s. 40.
[6] *Wright* v. *Cart Navigation Co.*, 1904, 11 S.L.T. 708; Wilton, Company Law and Practice, p. 648; Maclaren, Bill Chamber Practice, p. 253.

1084. Where a factor was appointed with consent of the company it was held (1) that shareholders of the company had no title to interfere between the mortgagee and the factor on the one hand and the company on the other in settling the discharge of the factor, who was appointed with the sanction of the company; (2) that although the factor had been properly appointed on the "undertaking," his duties as factor were limited to receiving the tolls and paying the interest due to the mortgagees at the date of his appointment; and (3) that in accounting to the company for the balance in his hands, he was entitled to deduct expenses reasonably incurred in the proper business of the factory, including such as were incurred by him under the employment of the company.[1] In a later case it was likewise held that a judicial factor appointed under s. 70 of the Greenock Harbour Act, 1880, had no power at his own hand to alter the harbour rates fixed by the harbour trustees, his only duty being to receive and apply them.[2]

1085. The power of a judicial factor under this company statute is in contrast with the power of a judicial factor under the Railway Companies (Scotland) Act, 1867,[3] s. 4, who under and by virtue of his appointment has been held to have the sole exclusive power of management of the undertaking of the railway company and of the whole works and property connected therewith.[4]

1086. Where a railway company was incorporated by Act of Parliament and its shares had been fully subscribed, but no part of the capital had been paid by the shareholders to the company, and the works authorised had never been begun, a petition at the instance of creditors holding a decree against the company was held incompetent in respect (1) that there existed no "undertaking" within the meaning of the railway statutes, and (2) that there was no case stated for appointment at common law.[5]

Section 5.—Duties and Liabilities of Judicial Factors.

Subsection (1).—*Scope of Statutes.*

1087. It is to be noted that the Act of Sederunt of 13th February 1730 and the Pupils Protection Act of 1849[6] apply expressly only to factors *loco tutoris*, factors *loco absentis*, and *curators bonis*,[7] and the Judicial Factors (Scotland) Act, 1880,[8] only to factors *loco tutoris* and *curators bonis*. It was only the Judicial Factors (Scotland) Act,

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[1] *Cotton* v. *Beattie*, 1889, 17 R. 262.

[2] *Greenock Harbour Trs.* v. *J.F. on Greenock Harbour Trust*, 1908 S.C. 944; affd. 1910 S.C. (H.L.) 32.

[3] 30 & 31 Vict. c. 126, s. 4.

[4] *Haldane* v. *Girvan and Portpatrick Rly. Co.*, 1881, 8 R. 669; see also as to powers of Factor, 8 R. 1003; 9 R. 253 and 854.

[5] *Paterson* v. *Best*, 1900, 2 F. 1088; see Wilton, p. 649, and *Mason* (*Dundee Suburban Rly. Co.*), 1902, 10 S.L.T., pp. 253 and 256.

[6] 12 & 13 Vict. c. 51, s. 1.

[7] *Morrison*, 1857, 19 D. 504.

[8] 43 & 44 Vict. c. 4, s. 3.

1889,[1] that brought all classes of factors appointed by the Court of Session and the Sheriff Court under the provisions of the two statutes above mentioned.

SUBSECTION (2).—*Ingathering and Investment of Estate.*

1088. The first duty of a factor after his appointment is to find caution.[2] He may then extract the decree of his appointment and must at once proceed to take possession of the estate and complete his title to the moveable property. It is his duty to recover all important writs and documents, to collect debts and to realise investments of a kind not suitable to be held by him as a judicial factor, to invest or reinvest the money collected or realised in trust securities, and, in case of heritable securities, to satisfy himself by certificates from the law agents and by certified valuation and rentals that the securities are adequate.[3] The Act and decree of a judicial factor's appointment, other than that of a factor *loco tutoris*, *curator bonis*, and factor *loco absentis*, must be stamped with a 10s. stamp within one month from the date of the extract.[4]

SUBSECTION (3).—*Inventory.*

1089. An inventory containing rental of lands, list of funds, and inventory of moveables must be lodged with the Accountant of Court as soon as possible and at latest within six months from the date of acceptance of the factor's bond of caution.[5] The inventory must shew the amount of the estate at the date of the appointment, before the factor has had any intromissions therewith or has realised any of the securities, and it must be signed by the factor on each page. All documents of debt and other documents necessary to instruct the inventory must be lodged with it.[6]

1090. Funds and moveables furth of Scotland, but in the British Dominions, are recoverable by the judicial factor on production of an extract decree of his appointment.[7] The Bank of England has made difficulty in regard to this enactment, but by s. 66 of the Finance Act, 1916,[8] it is provided that any order or decree of any Court in the United Kingdom whereby the right to transfer or call for a transfer of any government stock or to receive any dividends thereon is expressed to be invested in any person shall be sufficient authority to the Bank of England, etc., to allow the transfer of the stock or to pay the dividends in accordance with the order or decree, and where any government stock

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[1] 52 & 53 Vict. c. 39, s. 6; *Aitken*, 1893, 21 R. 62; *Accountant of Court*, 1907 S.C. 909.
[2] Para. 1045, *supra*. [3] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 3.
[4] Notes for Guidance of Factors issued by the Accountant of Court, II., Parliament-House Book, D 18.
[5] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), ss. 3 and 12.
[6] Notes by Accountant of Court, III., Parliament-House Book, D 18.
[7] 52 & 53 Vict. c. 39, s. 13; Lunacy Act, 1890 (53 Vict. c. 5), s. 131 (2), (3); *Morrison* (*Todd's Curator bonis*), 1901, 4 F. 144.
[8] 6 & 7 Geo. V. c. 24, s. 66.

is specified in the official extract of appointment or in a certificate under seal of the Accountant of Court, produced along with such extract as belonging to or forming part of the estate under the charge of the person named in the extract, it shall be deemed for the purposes of the section to be a decree whereby the rights to transfer said government stock is vested in the person so named. This provision does not apply to Colonial Government stocks.

1091. A printed copy of notes for the guidance of judicial factors, containing instructions for the preparation of inventories, forms of accounts, etc., is issued to every judicial factor on his finding caution. These notes will also be found in the Parliament-House Book.[1]

Subsection (4).—*Separate Bank Account.*

1092. The factor shall lodge the money in his hands in bank in a separate account or on deposit receipt in his own name as judicial factor. Twenty per cent. penal interest is to be charged on all balances exceeding £50 in Court of Session factories, and £25 in Sheriff Court factories, remaining in the factor's hands more than ten days.[2]

Subsection (5).—*Annual Accounts and Audit.*

1093. The Accountant of Court will fix a date for the annual closing of the accounts of the factory, and within one month from that date in each year the factor shall lodge with him accounts in the prescribed form, with all necessary particulars and vouchers and certificates with an account current or list of daily balances, and rentals of heritable properties. The Accountant may, on cause shewn, prorogate the time for lodging such accounts and vouchers, but not beyond three months from the date fixed for the closing of the accounts.[3] A fine of not less than half a year's commission is imposed by the Act of Sederunt of 13th February 1730 for failure to lodge accounts.[4] In a later case the Court held that the penalties of the Act of Sederunt were in the discretion of the Court.[5]

1094. The Accountant's audit and report shall be conclusive against the factor and his cautioner if written objections shall not be lodged by the factor with the Accountant within twenty days from the date of such audit and report being communicated to the factor; but if objections be lodged, the Accountant shall consider the same, and may alter his report if he sees cause; and unless the objections are allowed or departed from, the account and report and whole proceedings shall be transmitted by the Accountant to the Lord Ordinary, who shall call the factor or his agent, and if necessary the Accountant, before him at

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[1] Parliament-House Book, D 18. [2] Pupils Protection Act, 1849, s. 5; C.A.S., L, viii. 13.
[3] Pupils Protection Act, 1849, ss. 4, 11, 12, 13, 14.
[4] Act of Sederunt, 13th February 1730, s. 4; *Lowe* v. *Simpson*, 1872, 11 M. 17.
[5] *Morrison*, 1890, 17 R. 704.

chambers in reference thereto, and the Lord Ordinary or the Court, if the matter shall be reported or brought under review, may affirm, vary, or reverse the audit and report of the Accountant, and may reserve any question or questions which are raised in the objections for the factor till the final audit of his accounts, directing the account to be balanced for the present, as the Lord Ordinary or the Court may think expedient and just; and no judgment of the Lord Ordinary, pronounced as aforesaid, shall be subject to review at the instance of the Accountant, nor, in case the Lord Ordinary shall reserve any question as aforesaid, shall it be competent to the factor to reclaim against such reservation; but in case the Lord Ordinary shall decide against the factor, he may bring the interlocutor under review of the Court, by a short note of appeal from the Lord Ordinary's judgment, and the judgment of the Court shall not be subject to appeal at this stage nor till the termination of the factory, without the leave of the Court: Provided always, with reference to such discussion between the Accountant and the factor, that at the audit of the factor's accounts, at the termination of his factory, it shall be competent to the factor and his representatives, or to any succeeding factor, or to any parties beneficially interested in the estate, to enter upon such matter of objection, if the same has been reserved, but if the same has been decided by the Lord Ordinary or the Court, the decision shall not be opened up except upon cause shewn; and the factor shall not be entitled to charge the expense of any such proceedings against the estate without the special authority of the Lord Ordinary or the Court.[1]

1095. The cautioner for a factor may be heard before the Accountant during the course of the audit or state objections to the audit within twenty days of the report of the audit being intimated to the factor, but no such objection shall be any ground for delaying the consignation of any balance or giving immediate effect to the audit.[2] Any party beneficially interested or any succeeding factor may on cause shewn open up an audit conducted in his absence, either at the termination of the factory or during its subsistence.[3]

Subsection (6).—*Misconduct of Factor.*

1096. If the factor shall misconduct himself or fail in the discharge of his duty, he shall be liable to such fine, and to the forfeiture of the whole or any part of his commission, and to suspension and removal from his office as factor, and to payment of expenses, or to any one or more of such penalties, as the Court in its discretion shall decide; and that over and above such liability as he may be subject to, as accords of law, in reparation of any loss or damage sustained by the estate in consequence of such misconduct or failure.[4]

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[1] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 15.
[2] *Ibid.*, s. 16. [3] *Ibid.*, s. 17. [4] *Ibid.*, s. 6.

Subsection (7).—*Requisition by Accountant of Court.*

1097. The Accountant may make such requisition or order upon the factor as he may consider necessary, and if such requisition or order be not obeyed he may, after intimation to the factor or his agent, report the factor's failure to obey to the Lord Ordinary, who may recall or may confirm or repeat such requisition or order, and the interlocutor of the Lord Ordinary shall be final and conclusive against the Accountant and against the factor unless he shall at the time of pronouncing judgment give notice of his intention to bring the judgment under review.[1]

Subsection (8).—*Eases, Discounts, and Commissions.*

1098. The factor must credit the estate with all eases, discounts, and commissions received by him.[2] His commission fixed by the Accountant of Court is the proper remuneration for his trouble and skill, and he is not entitled to make any other profit out of the estate,[3] nor can a firm of which he is a partner do so.[4] In two recent cases the duty of a *curator bonis* to account to the estate for commission received by him or by his law agent from the Edinburgh Corporation on account of money belonging to the curatory invested in city mortgages was raised, and the Lord Ordinary held in each case that the amount of commission must be credited to the estate.[5] In his judgment in these cases Lord Moncrieff reviewed both the Scots and English authorities. Where the factor's firm were acting as law agents in a petition for discharge of a *curator bonis*, Lord Anderson directed that the Accountant in fixing commission should take into account in determining the amount of that commission the fact that the petitioners would have to incur legal charges in bringing the curatory to an end, and allowed a fee of ten guineas in place of business charges.[6]

Section 6.—Ordinary Powers of Factor.

Subsection (1).—*Factory does not affect Creditors.*

1099. The position of creditors and their rights and remedies are not as a general rule affected by the appointment of a factor. Nor does the appointment affect the validity of trust deeds and the like.[7] The factor assumes the estate with all its burdens and liabilities and has merely the duty of preserving it for the person or persons to whom it belongs. His appointment interposes no barrier to the right of creditors

[1] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), ss. 19, 20.

[2] A. of S., 31st July 1717.

[3] *Guthrie*, 1853, 16 D. 214; *Robertson* v. *Morrison*, 1849, 6 Bell's App. 422, per the Lord Chancellor at p. 425.

[4] *Gray*, 1856, 19 D. 1; *Mitchell*, 1878, 5 R. 1124; cf. *Goodwin*, 1858, 20 D. 1141; *Sleigh* v. *Sleigh's J.F.*, 1908 S.C. 1112.

[5] *A. B.'s Curatory* and *C. D.'s Curatory*, 1927, S.L.T. 430.

[6] *Dallas* (*M'Nab's C.B.*), 30th March 1915, unreported.

[7] Thoms, p. 68; *Souter* v. *Brown*, 1852, 15 D. 89; *Shand* v. *Macdonald*, 1862, 24 D. 829.

to pursue any competent diligence,[1] nor does it hinder an application for sequestration under the Bankruptcy Act.[2]

SUBSECTION (2).—*Factor may not Speculate.*

1100. The factor is not entitled to speculate with the estate and run the risk of ruin or loss.[3]

SUBSECTION (3).—*Factor may not delegate Duties.*

1101. The factor may not delegate his duties, but is entitled to take legal advice and assistance [4] and may employ an assistant, though, unless in special circumstances or when the employment of such assistant is authorised by Court, he must pay the assistant himself.[5]

SUBSECTION (4).—*Factor may not alter Succession.*

1102. No act of management by a factor can alter the succession, but acts necessary by law may have that effect.[6] Lord Pres. M'Neill in *Moncrieff* v. *Miln* said: "The general proposition is clearly established that the character of a succession is not to be altered by the act of a curator. There may be exceptions to that proposition in cases of absolute necessity, but the general proposition is that it cannot be done. If the estate is sold, for example, for payment of debt by compulsion and legal necessity, that is not an alteration of the succession but an extinction of it."

SUBSECTION (5).—*Applications under Entail Acts.*

1103. In every case in which it is competent for an heir of entail in possession of an entailed estate, being of full age and not subject to any legal incapacity, to make an application to the Court under the Entail Acts, it is competent for an heir in possession, though a minor, with consent of his curators, or for the tutors of an heir if he is a pupil, or for his curator or other administrator if he is otherwise incapacitated, to make such application, not being an application for authority to disentail the entailed estate or any part thereof, and to execute and carry into effect any authority which may be given by the Court. Provided that the Court shall not grant such application unless they are satisfied that it is for the benefit of the heir by whom or on whose behalf it is made.[7] A factor making such application does not apparently require

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[1] *Ferguson*, 1853, 15 D. 682.
[2] *Simpson* v. *Miles*, 1881, 9 R. 104; Goudy on Bankruptcy, 4th ed., p. 500.
[3] *Kirkland*, 1848, 10 D. 1232
[4] *Barlas* v. *Moncrieff*, 1859, 21 D. 725.
[5] *Duke of Roxburgh*, 1824, 2 Sh. App. 18.
[6] Thoms, p. 69; *Moncrieff* v. *Miln*, 1856, 18 D. 1286; *Stuart* (*Marquis of Bute's Tutor*), 1855, 17 D. 378, at pp. 380–1; *Taylor's Trs.* v. *Shepherd*, 1927, S.L.T. 226; cf. *Dick* v. *Dick*, 1925, S.L.T. 337.
[7] Entail (Scotland) Act, 1882 (45 & 46 Vict. c. 53), s. 11.

special powers from the Court under the Pupils Protection Act,[1] though such power has frequently been granted.

Subsection (6).—*Recovery of Estate.*

1104. The factor must give his attention at once to obtaining delivery and possession of the estate, wheresoever situated, from those in whose hands it may have been at the date of his appointment, and to settling with them, and if necessary take proceedings to make his possession effective.[2] He must do his utmost to recover debts due to the estate.[3] The presumption is that debtors are solvent, and the factor must not fail to take all reasonable measures to ensure payment,[4] though he is not bound to do ultimate diligence against all debtors indiscriminately,[5] nor to sue actions where it can be shewn that there is not sufficient ground of probation for instructing the debt.[6]

1105. It is within the ordinary powers of a factor to sue [7] and to defend [8] actions in the Courts of Scotland. In regard to proceedings in foreign Courts the same rule applies, but it may be necessary in some cases, on account of the law and practice of the foreign state, to obtain special powers.[9] A factor is not entitled to waive legal nullities.[10] Hence allowance is made for a somewhat over-anxious defence when the factor sues or defends *in bona fide*.[11]

1106. Can there be *res judicata* in an action with a factor? This question has arisen on more than one occasion in the case of a factor *loco absentis*, and where the action is not instantly necessary to protect the estate it has been judicially suggested that the sanction of the Court to the raising of the action should first be obtained.[12] "The great obstacle against admitting the powers of the factor to carry on actions at his own discretion is that he undoubtedly cannot bind the principal as the mandatory would have done. The defender would not be safe by a decree of absolvitor because the pursuer might disavow the proceedings of the factor." [13] It appears to be competent to refer to the oath of a factor in regard to matters which occurred during his administration of the estate.[14]

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[1] *Moncreiff, Petr.*, 1894, 1 S.L.T., p. 528, but see Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 7.

[2] Thoms, p. 72; *Accountant of Court* v. *Geddes*, 1858, 20 D. 1174; *Accountant of Court* v. *Baird*, 1858, 20 D. 1176, per Lord Pres. M'Neill at p. 1181.

[3] Thoms, p. 71; *Cranston* v. *Scott*, 1826, 5 S. 57 (62).

[4] *Weir* v. *Hamilton*, 1682, Mor. 16355.

[5] *Goudie* v. *Stewart*, 1834, 13 S. 61; 11 & 12 Vict. c. 58 s. 4 (*j*).

[6] *Scrymgeour* v. *Wedderburn*, 1673, Mor. 16289.

[7] Thoms, p. 95; *Kennedy* v. *McLean*, 1851, 13 D. 705, Lord Mackenzie's opinion.

[8] Thoms, p. 97.

[9] *Ibid.*; *Scott* v. *Rushley*, 1855, 1 K. & J. 281.

[10] Thoms, p. 99; *Hunter*, 1739, Mor. 16341, but see *Barlas* v. *Moncrieff*, 1859, 21 D. 725.

[11] *Thomson* v. *Thomson*, 1840, 2 D. 1234.

[12] Thoms, pp. 100 and 168; Irons, p. 242.

[13] *Lumsdaine* v. *Balfour*, 1827, 2 F.C. 472, per Lord Mackenzie; *Watson*, 1864, 2 M. 1333; *Paton*, 1785, Mor. 4071; *Kennedy* v. *McLean*, 1851, 13 D. 705.

[14] Thoms, p. 100; Irons, p. 92.

SUBSECTION (7).—*Title to Moveables.*

1107. An official extract of an appointment of any judicial factor . . . or other person judicially appointed . . . shall have throughout the British Dominions as well out of Scotland as in Scotland the full force and effect of an assignment or transfer executed in legal and appropriate form of all funds, property, and effects situated or invested in any part of the British Dominions and belonging to or forming part of the estate under his charge; and all debtors and others holding any such funds, property, or effects shall be bound, on production of such official extract, to pay over, assign, or transfer the same to such judicial factor . . . or other person.[1] A factor is also entitled as representing a beneficiary to obtain confirmation as executor dative, where such confirmation is necessary, unless some other person having a title offers to confirm.[2]

1108. Stocks and shares should be transferred to and held in the name of the person appointed judicial factor as such factor, and where that cannot be done they should be placed in his name as an individual, and he should endorse the certificate or other document to the effect that the stock or shares are held by him as judicial factor.[3] This rule applies to factors *loco tutoris*, *curators bonis*, and factors *loco absentis*, as well as to judicial factors on trust estates and all others. If the factor proposes immediately to realise the stock or shares it may be sufficient that he intimates his appointment, exhibiting the Act and Decree without himself registering as a member of the company and incurring the liabilities of such.[4] In the case of stocks inscribed in the books of the Bank of England or other bank for which no scrip is issued, certificates by the bank must be produced at the annual audit and endorsed by the factor, and these along with the inscription and attorney notes are retained by the Accountant as evidence that the stock was purchased and is held for the ward or estate.[5] A factor must not retain certificates to bearer or debentures or other bonds or documents payable to bearer beyond a reasonable time for conversion or realisation.[6]

SUBSECTION (8).—*Heritable Securities.*

1109. When investments are made in Scottish heritable securities the bonds and dispositions in security are taken in name of the ward where there is a ward, in other cases in name of the judicial factor as factor.

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[1] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39), s. 13; see para. 1090 *supra*.

[2] A. of S., 13th February 1730, s. 7; *Johnstone* v. *Lowden*, 16 S. 541; *Whiffen* v. *Lees*, 1872, 10 M. 797, per the Lord President at p. 800; Currie on Confirmation of Executors, 2nd ed., p. 94.

[3] *Accountant of Court* v. *Crumpton's C.B.*, 1886, 14 R. 55; *Brodie* v. *London and North-Western Rly. Co.*, 1912, 2 S.L.T. 447.

[4] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 24; *Wishart and Ors.* v. *City of Glasgow Bank*, 1879, 6 R. 1341; *Royal Bank of Scotland* v. *Greenlees*, 1887, 15 R. 982; cf. *M'Ewan*, 1879, 6 R. 1315; *Gordon*, 1879, 17 S.L.R. 7.

[5] Notes for Guidance of Factors, Parliament-House Book, D 23.

[6] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 15.

SUBSECTION (9).—*Responsibility for Investments.*

1110. Scottish heritable securities have always been regarded as pre-eminently the form in which trust and factory funds should be invested. About the middle of last century the Court, at first rather grudgingly, extended the power of investment to Government stocks, and in 1876 to mortgages of corporations or public trusts in Scotland duly authorised by Act of Parliament to borrow money on mortgage and to levy rates for the payment of interest.[1] The Trusts Acts have greatly extended the scope of trust investments, and these have been made available to factors as trustees under these Acts. They will be found set forth in ss. 10 to 15 of the Trusts (Scotland) Act, 1921.[2] The responsibility of investment even in those authorised trust investments rests with the factor. The Accountant of Court is directed at each annual audit to consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence.[3] The passing of an investment by the Accountant does not relieve the factor of his responsibility to exercise due prudence and vigilance.

1111. No specific limit can be put on the time within which a factor must realise moveable estate.[4] He must not throw it on the market when that would result in a loss, but, on the other hand, he cannot retain it in expectation of a speculative rise.[5] It is clearly the duty of a judicial factor in ordinary circumstances to get rid at once of all investments which, by having uncalled capital, expose the estate under his charge to a future and uncertain liability, but in special circumstances the Court have granted power to retain such shares.[6]

1112. The alienation or purchase of heritable property is beyond a factor's ordinary powers,[7] except as the power of sale may be conferred under the Trusts (Scotland) Act, 1921.[8] A factor has the ordinary powers of management of a proprietor of heritable estate.[9] He has power to remove tenants and execute necessary repairs and improvements upon the estate. His powers regarding the granting of leases, formerly limited to the duration of his office and one year thereafter, have been greatly extended by the Trusts Acts to be immediately referred to.[10]

SUBSECTION (10).—*Powers under the Trusts Acts.*

1113. The Trusts Acts passed during the last sixty years have greatly extended the powers of trustees. These powers are now detailed in the Trusts (Scotland) Act, 1921,[11] s. 4 of which enacts that acts done in

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[1] Thoms, p. 75.
[2] 11 & 12 Geo. V. c. 58, ss. 10, 11, 12.
[3] Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 13.
[4] *Haldane*, 1848, 11 D. 286 ; *Dalgleish*, 1849, and *Lindsay*, 1849, 11 D. 1030.
[5] *Kirkland*, 1848, 10 D. 1232.
[6] *Browning's J.F.*, 1905, 7 F. 1037.
[7] Thoms, p. 77 ; *Lambe*, 1834, 12 S. 755 ; 1837, 16 S. 219.
[8] See next para.
[9] Thoms, p. 82.
[10] A. of S., 13th February 1730, s. 8.
[11] 11 & 12 Geo. V. c. 58, s. 4.

the exercise of these powers, when such acts are not at variance with the terms or purposes of the trust ("trust" is defined as including the appointment of a judicial factor), shall be as effectual as if such powers had been conferred in the trust deed. The powers referred to are as follows, viz.:

(*a*) To sell the trust estate or any part thereof, heritable as well as moveable.

(*b*) To grant feus of the heritable estate or any part thereof.

(*c*) To grant leases of any duration (including mineral leases) of the heritable estate or any part thereof, and to remove tenants.

(*d*) To borrow money on the security of the trust estate or any part thereof, heritable as well as moveable.

(*e*) To excamb any part of the trust estate which is heritable.

(*f*) To appoint factors and law agents and to pay them suitable remuneration.

(*g*) To discharge trustees who have resigned and the representatives of trustees who have died.

(*h*) To uplift, discharge, or assign debts due to the trust estate.

(*i*) To compromise or to submit and refer all claims connected with the trust estate.

(*j*) To refrain from doing diligence for the recovery of any debt due to the truster which the trustees may reasonably deem irrecoverable.

(*k*) To grant all deeds necessary for carrying into effect the powers vested in the trustees.

(*l*) To pay debts due by the truster, or by the trust estate, without requiring the creditors to constitute such debts, where the trustees are satisfied that the debts are proper debts of the trust.

(*m*) To make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of land, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.

(*n*) To apply the whole or any part of trust funds, which the trustees are empowered or directed by the trust deed to invest in the purchase of heritable property, in the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs and subject to the same conditions as are by the trust deed made applicable to heritable property directed to be purchased.

The section applies to acts done before as well as after the passing of the Act. In applying it to the case of a factor it must be borne in mind that the appointment of a judicial factor is an extraordinary remedy, and hence his powers are limited to what each case demands.[1]

[1] Thoms, p. 64; *Paterson*, 1865, 3 M. 559; *Shedden*, 1867, 5 M. 955; *Annan* (*Leslie's J.F.*), 1925 S.C. 464; *Stormonth Darling* (*Marquis of Lothian's C.B.*), 1927 S.C. 579.

1114. In the Trusts (Scotland) Amendment Act, 1884,[1] the following definitions are given: Judicial factor shall mean any person judicially appointed factor upon a trust estate or upon the estate of a person incapable of managing his own affairs, factor *loco tutoris*, factor *loco absentis*, and *curator bonis*; "Trustee" shall include any . . . tutor, curator, and judicial factor; "Trust" shall mean and include . . . the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise. These definitions are repeated in the Trusts (Scotland) Act, 1921, and in that Act "Trust deed" is defined as meaning and including . . . any decree, deed, or other writing appointing a tutor, curator, or judicial factor.[2] The Act of 1884 was held by Lord Kincairney to be declaratory and retrospective in its application.[3]

1115. The term "trust estate" used in the definition of judicial factor in these Acts has given rise to difficulty. The Second Division held that a judicial factor appointed under s. 163 of the Bankruptcy (Scotland) Act, 1913, was a trustee within the meaning of the Trusts (Scotland) Act, 1921, and had power to sell the heritable estate upon which he was factor without receiving special authority from the Court, not only where the estate which he administered was an existing trust estate at the date of his appointment, but also where the estate was the estate of an intestate, and where, accordingly, there was prior to his appointment no trust in existence. The Lord Justice-Clerk was of opinion that the trust estate was created *ipso facto* by the appointment of the judicial factor.[4] Lord Anderson expressed the view that every judicial factor appointed by the Court, and whose duties are supervised by the Accountant of Court, is entitled by virtue of his being a trustee under the Act to sell the estate on which he is factor without the sanction of the Court.[4] This judgment appears to have been in accordance with the general interpretation of the statute of 1921 and the practice adopted by the profession after the passing of the Act. In the following year, however, in a case reported to the First Division on a question of completion of title arising under the Conveyancing (Scotland) Act, 1924, the Lord President expressed doubt whether the definition of judicial factor in the Trusts Acts extended beyond judicial factors on trust estates, where the trust was constituted prior to the date of the appointment, and factors on the estates of *incapaces* (pupils, minors, absentees, and lunatics). The Court held in this case that a judicial factor was not a person having right to land within the meaning of ss. 3 and 4 of the Conveyancing (Scotland) Act, 1924, and in that respect was not in the same position as a trustee.[5] These decisions have left the position and powers of judicial factors in considerable uncertainty, which has not been relieved by the case of *Stormonth Darling* (*the Marquis of Lothian's Curator bonis*), in which the matter was again discussed.[6]

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[1] 47 & 48 Vict. c. 63, s. 2. [2] 11 & 12 Geo. V. c. 58, s. 2.
[3] *Scott* v. *Craig's Repr.*, 1897, 24 R. 462, at p. 466.
[4] *Munro* (*Lowe's J.F.*), 1925 S.C. 11; *Thomson* (*Mackay's J.F.*), 1925 S.C. 11.
[5] *Annan* (*Leslie's J.F.*), 1925 S.C. 464, per the Lord President at p. 469. [6] 1927 S.C. 579.

1116. It must be noted that, if factors other than those specified by the Lord President are not trustees within the meaning of the Trusts Acts, the Court cannot under s. 5 of the Act of 1921 authorise them to exercise the general powers conferred on trustees by s. 4 of the Act when the exercise of these powers is at variance with the purposes of their appointments. These words, "not at variance with the terms and purposes of the trust," [1] themselves have created a further difficulty in the case of judicial factors. A factor is only appointed to conserve and manage the estate under his charge,[2] and in a narrow reading, founded on the old law regarding heritage, his appointment may be said to be at variance with the exercise of a power of sale unless under the special direction of the truster or the compulsion of necessity. The opinions of the judges in the case of *Leslie's Factor* have emphasised this difficulty. Where, therefore, there is any doubt the practice has grown up of applying to the Court for powers, and in consequence of the difficulty that has been judicially recognised, the Lord Ordinary usually either grants the power or refuses the crave as unnecessary.[3]

SUBSECTION (11).—*Powers of Judicial Factors on Trust Estates.*

1117. Special considerations enter into the determination of the ordinary powers of judicial factors on trust estates. It has been accepted as a rule that the measure of these powers is the trust deed, and that the powers given to the trustees may be executed by the factor who has been appointed to take over the administration of the trust,[4] but this is subject to exceptions. A judicial factor must, for example, apply for authority to complete title to heritage,[5] and in selling heritage, as we have seen, it has been and is now usual for the factor to seek the sanction of the Court to fortify the title he gives. But where a trust deed contained directions to sell heritage an application for special power was refused as unnecessary.[6] We have also seen that sequestration of a trust estate, while it suspends the trustees' authority to intromit with and administer the estate, does not prevent their exercise of discretionary powers conferred upon them by the trust deed.[7]

1118. A factor on an entailed estate was refused special power to grant a lease for such a period as was permitted in the deed of entail, that act being, in respect of the terms of the deed, an ordinary act of

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[1] Trusts (Scotland) Acts, 1867 and 1921; 11 & 12 Geo. V. c. 58, s. 4.

[2] *Bryce* v. *Graham*, 1828, 6 S. 425; affd. 3 W. & S. 323; *Neilson or Paterson and Ors., Petrs.*, 1865, 3 M. 559, per Lord Justice-Clerk Inglis at p. 560; Thoms, p. 64.

[3] *Munro* (*Lowe's J.F.*), 1925 S.C. 11; *Annan* (*Leslie's J.F.*), 1925 S.C. 464; *Stormonth Darling* (*Marquis of Lothian's C.B.*), 1927 S.C. 579; *Brunton*, 1928 S.N. 112; *M'Bain*, 1928 S.N. 103.

[4] Thoms, p. 63; *Ferguson* v. *Murray*, 1853, 15 D. 682; *Browning's J.F.*, 1905, 7 F. 1037, per Lord Johnston; Titles to Land Consolidation (Scotland) Act, 1868, s. 3.

[5] *Annan* (*Leslie's J.F.*), 1925 S.C.

[6] *Stirling's J.F.*, 1917, 1 S.L.T. 163.

[7] See para. 1034 *supra*; *Cowan* v. *Crawford*, 1837, 15 S. 399; *Shedden*, 1867, 5 M. 955; cf. *Paterson's J.F.* v. *Lindsay*, 1916, 2 S.L.T. 244.

administration.[1] On the other hand, the Court granted special power to a factor *loco tutoris* to the heir in possession of an entailed estate to grant leases for nineteen years on a report that farms could not be let to advantage for a shorter period, the next substitute of entail being abroad, and his agents declining to interfere.[2]

1119. A factor appointed on a trust estate, where the trust deed gave power to the trustees at their discretion to make advances of capital to beneficiaries, was considered not entitled to exercise the power.[3] It is a question of the precise terms of the trust and the intention of the testator in each case whether discretionary powers transmit to the factor or not. If there is clear evidence of *delectus personæ*, as in the case of *Hill's Trustees* v. *Thomson*,[4] the discretionary power will not transmit. In that case the testatrix in conferring upon her trustees extensive discretionary powers for the administration, division, and apportionment of certain estate destined to her grandchildren, added, "in whose judgment and discretion I have perfect confidence"; no power of assumption of new trustees was given in the deed; the Court held that the discretionary power did not transmit. So also where a testatrix conveyed her whole means and estate to trustees (also appointed executors) for certain purposes, and with regard to the residue ordained the same to be paid by her executors to such charitable and religious purposes and in such proportions as they or the acceptor or survivor of them might think proper according to their or his discretion, and where the distribution was expected to take place on the death of the testatrix, and no provision was made in the deed for the assumption of new trustees, it was held that there was *delectus personæ*, and that the discretionary power did not transmit to a factor appointed after the death of all the trustees.[5] A testator gave his whole estate to "my sister Isabella and my brothers John and Robert equally . . ." but only after payment of certain legacies, including "to the deserving working people in the parish of Annan £500, which sum I desire my brothers to distribute amongst them according to their good judgment and discretion." Part of this sum was distributed by one of the brothers who survived the testator, but on his death it was held that there had been *delectus personæ*, that it had become impossible to carry out the trust, and that the legacy so far as not distributed failed.[6]

1120. A testator conveyed estate to trustees named, and "to such person or persons as he should thereafter name, or as should be assumed, and to the acceptors, etc.," to hold £4000 for behoof of his son D. in liferent allenarly, and of his issue in fee, whom failing to the testator's other sons, with power to the trustees if they thought it prudent to

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[1] *Proctor*, 1824, 2 S. 650 (N.E. 553).

[2] *Mackenzie*, 1842, 4 D. 456; for power of heir of entail to grant leases see Rosebery Act (6 & 7 William IV. c. 42), s. 1.

[3] *Nisbet*, 1848, 10 D. 36.

[4] 1874, 2 R. 68.

[5] *Robbie's J.F.* v. *Macrae*, 1893, 20 R. 358; *Goudie* v. *Forbes*, 1904, 12 S.L.T. 377.

[6] *Laurie* v. *Brown*, 1911, 1 S.L.T. 84.

pay the whole or any part of the principal to D. All the trustees resigned, and a factor was appointed. On a petition at the instance of the factor, the liferenter D., and all others, then in existence, interested, the Court appointed a new factor and granted him special powers to apply £1000 in the purchase of an annuity on the life of D., holding that there was no *delectus personæ*.[1] A testatrix by her trust disposition and settlement and codicil appointed one trustee, and directed that the residue of her estate should be divided among such charitable institutions in Glasgow and in such proportions as "my trustees in their absolute and uncontrolled discretion shall decide." The deed was silent as to the assumption of new trustees. The sole trustee assumed a new trustee in virtue of the statutory powers conferred by the Trusts Acts, but died before any steps had been taken to select the charities to be benefited by the bequest. It was held that there had been no *delectus personæ*, and that the assumed trustee could validly exercise the discretionary power.[2] A testator by a holograph will appointed two persons to be his trustees, and after providing for certain legacies directed that the remainder of his estate should be invested as "my trustees" may direct and the interest paid to his son. He further directed that the principal sum so invested should remain under trust until the son's children should reach majority, and in the event of no children, should be disposed of to charities "as my trustees may think best." The will did not expressly confer a power to assume new trustees. The trustees declined to accept, and a factor was appointed. The son died, leaving no issue. It was held (1) that the discretionary powers conferred by the will were not personal to the individuals nominated; (2) that the judicial factor could at his own hand distribute the residue of the estate among charities as he thought best, in respect that in virtue of the provisions of the Trusts Act, 1921, he was a trustee within the meaning of the Act. Importance was attached to the fact that the testator must have anticipated a trust of fairly long duration, perhaps outliving the trustees named in the will.[3] Two points may be noted in the opinions of the judges in this last case: (1) the distinction between a factor and a trustee assumed or appointed by the Court referred to in some of the earlier cases is disregarded; and (2) the view was expressed that the factor should act on his own authority under the will and not in virtue of special powers conferred by the Court.

Section 7.—Completion of Title to Heritage.

1121. A judicial factor, as such, has no right to heritable property. The decree appointing him gives him no such right. He is an adminis-

[1] *Simson*, 1883, 10 R. 540; *Brown* (*Macfarlane's J.F.*), 1910, 1 S.L.T. 29; *Currie* (*M.'s C.B.*), 1904, 12 S.L.T. 30.

[2] *Shedden's Trs.* v. *Dykes*, 1914 S.C. 106, followed by Lord Hunter in *M'Credie's Trs.* v. *M'Credie*, 1915, S.L.T. 410, and Lord Blackburn in *Miln's Trs.* v. *Drachenauer*, 1921, 1 S.L.T. 152.

[3] *Woodward's J.F.*, 1926 S.C. 534; see also *Maclachlan's Trs.* v. *Gingold*, 1928, S.L.T. 409; *M'Bain*, 1928 S.N. 103.

trator only, and administration does not include alienation.[1] A distinction must be drawn between a factor who acts for a ward in whom the *dominium* of the estate is vested and a factor on an estate of which there is no existing *dominus*. In the first class, which includes factors *loco tutoris*, *curators bonis*, and factors *loco absentis*, the titles must not, unless in very exceptional circumstances, be taken in name of the factor. If the ward is already infeft nothing requires to be done; if not, then it is the duty of the factor to complete title in the ward's name. "A guardian of any kind . . . is not as such vested with the *dominium* of the ward's estate, and he does not act *qua* owner thereof. He acts for the owner and as his representative. . . . This is the case as to his actings in matters falling under his usual powers; and it is also the case in matters falling under any additional or special powers which may be conferred upon him, and accordingly, in such cases, where the title of the ward is not made up, the practice is that the guardians pray for and obtain special powers, first to make up titles in the person of the ward. . . . The case is different as to a judicial factor appointed on a trust estate in consequence of the non-acceptance or death of testamentary trustees, because in such a case there is no existing *dominus* of the estate, and the judicial factor, *qua* such merely, is not in the position of being either a fiduciary owner or representative of an existing owner of the subjects. And hence, if in performance of his factorial duties as to the trust estate, which is in abeyance, it becomes necessary to exercise such powers of ownership as selling, burdening, or entailing the estate, or disponing it to the beneficiaries, the factor must obtain the fiduciary fee of the estate vested *habili modo* in his person; and in such cases the Court is in use to authorise him to do so."[2]

1122. It has been held that a mother, as guardian to her pupil son under the Guardianship of Infants Acts, may complete title in his name by service as an ordinary act of administration. "The common law not only clothes the tutor with power to do this at his own hand, but imposes on him, in general, the duty to do so."[3] And the same has been held with regard to a *curator bonis*.[4] In the last case the crave was to complete title in the ward's name by special service, and the petition was dismissed as unnecessary. Had the crave been for authority to complete title under s. 24 of the Titles to Land Consolidation (Scotland) Act, 1868, it would have been granted as an appropriate step in conveyancing.[5]

1123. A judicial factor on an estate of which there is no existing *dominus* requires authority to complete title in his own name in order

[1] *Leslie's J.F.*, 1925 S.C. 464, per the Lord President at p. 471.

[2] *Maconochie*, 1857, 19 D. 366, per Lord Curriehill at pp. 372–3.

[3] *Ferrier* (*Ferrier's Tutrix*), 1924, S.L.T. 118; see *Kay* v. *Boreland*, 1837, 15 S. 850; *Mackenzie*, 24 D. 844.

[4] *Macpherson* (*Melville's C.B.*), 1924, S.L.T. 119.

[5] *Forbes*, 1922, S.L.T. 294; *Macpherson* (*Melville's C.B.*), *supra*; *M'Fadzean*, 1917 S.C. 142; Burns, Conveyancing, p. 303.

to vest in him the fiduciary fee of the estate under his charge.[1] This power will not in general be granted as matter of course, but only on cause shewn to the Lord Ordinary,[2] though he will no doubt be favourably disposed to an application made or adopted by the judicial factor.[3]

1124. Statutory procedure for completion of title by a factor in his own name or in name of his ward is provided under s. 24 of the Titles to Land Consolidation (Scotland) Act, 1868,[4] the Conveyancing (Scotland) Act, 1874,[5] s. 44, and the Conveyancing (Scotland) Act, 1924,[6] s. 5 (3).

1125. As in the case of special powers in general, it is not competent at common law to grant power to complete title until the factor has found caution, even where the crave is contained in the petition making the appointment, but there is an exception to this in applications made under s. 44 of the Conveyancing (Scotland) Act, 1874. That section directs that in the case of a factor appointed on a trust estate, where the trust title has been completed, the interlocutor whereby the appointment is made shall specify the trust deed and the other title or titles by which the trust title had been completed. Where the application is made and granted under this section it is essential that the direction should be strictly adhered to. The opinion has been expressed that s. 44 of the Conveyancing (Scotland) Act, 1874, is now extended by the Conveyancing (Scotland) Act, 1924, (1) not only to trust estates, but to all guardianship appointments, (2) to heritable securities which before was doubtful, and that whether a previous trust title had or had not been recorded,[7] but this does not coincide with the dictum of the Lord President in *Leslie's Factor*.[8] Where completion of title is the only power asked a remit to the Accountant to report is not required.

Section 8.—Special Powers other than Completion of Title to Heritage.

Subsection (1).—*General.*

1126. The Court of Session has always had the right to supplement the ordinary powers of guardians and judicial factors by granting where necessary extraordinary or special powers.[9] These powers are now granted on application to the Junior Lord Ordinary, whose jurisdiction during vacation is exercised by the Lord Ordinary officiating on the Bills,[10] and in cases to which his jurisdiction extends by the Sheriff.[11]

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[1] *Maconochie*, 1857, 19 D. 366, at p. 375; Burns, Conveyancing, p. 308; *Leslie's J.F.*, 1925 S.C. 464.
[2] *Leslie's J.F., supra*, per the Lord President at p. 471.
[3] *Paterson's J.F.*, 1916, 2 S.L.T. 244.
[4] 31 & 32 Vict. c. 101, s. 24.
[5] 37 & 38 Vict. c. 94, s. 44.
[6] 14 & 15 Geo. V. c. 27, s. 5 (3).
[7] Burns, Conveyancing, p. 860.
[8] 1925 S.C. 464, at p. 471.
[9] Thoms, p. 105; *Somerville's J.F.*, 1836, 14 S. 451; *Maconochie*, 1857, 19 D. 366.
[10] 12 & 13 Vict. c. 51, ss. 1, 7, 25; 20 & 21 Vict. c. 56, s. 4; 49 & 50 Vict. c. 27, s. 12; 52 & 53 Vict. c. 39, s. 14; *Dow, Petr.*, 1910 S.C. 273.
[11] 43 & 44 Vict. c. 4, s. 4; C.A.S., L, viii. s. 9.

They are granted on the application of the factor,[1] and though practice has admitted the application to be made in the petition for the appointment of the factor, the crave for such powers will not be considered until after the factor has found caution, and given his approval of the application.[2] Special powers have been granted in the interlocutor appointing a new factor where the former factor had obtained such powers and died without exercising them, but this is not in accordance with present practice.[3] Special powers other than power to complete title will not be granted without a report by the Accountant of Court.[4]

1127. An act done in virtue of special powers is in no respect beyond the reach of subsequent challenge. The Court in granting the powers on an *ex parte* statement merely extends the powers of the factor but in no way guarantees his acts, or exoners him from responsibility.[5] The Court looks with disfavour upon an application for special powers to fortify an act outwith the ordinary powers of a factor after it has been done, but in special circumstances such applications have been granted.[6] The extended ordinary powers given under the Trusts Acts have rendered it unnecessary in many cases to apply for special powers as, for instance, for renewing or granting for a period of years leases (including mineral leases) of heritable estate.[7]

Subsection (2).—*Particular Examples.*

1128. An enumeration of special powers granted or refused is given by Mr Maclaren in his work on Bill Chamber Practice, to which reference may be made.[8] A few instances may be given here.

1129. *Curators bonis* have been given powers to elect on behalf of their wards to take legal rights or provisions under settlements.[9] In an unreported case Lord Hunter, after interviewing an *incapax* who stated that she preferred to accept testamentary provisions which were ample though much less than her legal rights, found it unnecessary *in hoc statu* to deal with the application of her *curator bonis* for power to elect.[10] Power to elect was refused by Lord Blackburn,[11] and the *curator bonis* directed to accept testamentary provisions.

1130. Power to cut timber was refused to a factor on an entailed estate, the Court holding that, assuming that the ward if *sui juris* would

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[1] *Russell*, 1874, 2 R. 93; *Perry*, 1903, 10 S.L.T. 536.

[2] *Young*, 1905, 43 S.L.R. 648; Maclaren, Bill Chamber Practice, p. 110.

[3] Juridical Styles, vol. iii. p. 621 n.; *Raeburn*, 1851, 13 D. 951, but see *Beveridge and Ors.*, 1851, 13 D. 951.

[4] *Gillespie's J.F.*, 1902, 9 S.L.T. 421; *Perry*, 1903, 10 S.L.T. 536; *Callander*, 6 S.L.R. 527.

[5] *Ure* v. *Dale*, 29th February 1804, Mor. 16389; *Milne*, 1837, 15 S. 1104; *Wood*, 1855, 17 D. 580; *Mathieson*, 1857, 19 D. 917.

[6] *Hodge*, 1904, 11 S.L.T. 709.

[7] *Molleson, Petr.*, 1890, 17 R. 203; *Steel* (*Tosh's J.F.*), 1912, 50 S.L.R. 148.

[8] Maclaren, Bill Chamber Practice, p. 111.

[9] *M'Call's Trs.* v. *M'Call's C.B.*, etc., 1901, 3 F. 1065; *Skinner's C.B.*, 1903, 5 F. 914.

[10] *Neave's C.B.*, 21st June 1912; *Lawson* (*Neave's J.F.*) v. *Cook* (*Neave's Tr.*), 1928 S.L.T. 411, 1928 S. N. 60.

[11] *Broad* (*Potter's C.B.*), 20th March 1919, Minute Book, vol. 138, p. 196.

have been entitled to cut down and sell the timber, it was not the duty of the *curator bonis* to do so but to preserve the estate as it was.[1] Authority has been given to a factor to pay over the fee of the estate to a daughter (the fiar), the mother (the liferentrix) consenting, and the Lord Ordinary being of opinion that the liferent was not alimentary.[2] Special power has frequently been given to factors to make payments to dependents not children.[3] An application by the *curator bonis* of a person *incapax* for authority to pay out of the surplus income of the ward's estate an alimentary allowance to the only brother and heir-at-law of the ward who was destitute was refused on the ground that this was a matter in which the Court would not interfere with the curator's discretion.[4] Lord Cullen granted such power in a case where two young women, nieces of the ward, were dependent upon her and had been adopted by her in their infancy.[5] The tutors of an infant heiress were given power to make an alimentary advance to the ward's heir, a cousin, also an infant and destitute. In this case authority was given *ex post facto*.[6] In special circumstances the Court (Second Division), exercising the *nobile officium*, granted trustees authority to purchase a farm,[7] and authority has also been granted to purchase a dwelling-house for the ward when that appeared necessary for her well-being.[8]

1131. It has been held that a testator's directions to divide the whole estate implied a direction to sell, and special power was refused as unnecessary.[9] Authority was given to a factor to sell heritage where a case of expediency was made out, but where the sale was at variance with the purposes of the trust.[10] Power to transfer to trustees War Stock standing in the name of the ward, but held by him in trust, has been granted.[11] Authority has been given to a judicial factor to retain for a limited time shares in a limited company which were subject to a liability for possible calls, the factor stating that the prospects of the company were improving.[12] Special powers to invest sums derived from sale of heritage and held as a *surrogatum* therefor in purchase of other heritage, and to borrow on the security thereof, were granted.[13]

Subsection (3).—*Special Powers under the Trusts (Scotland) Act*, 1921.

1132. Under s. 5[14] of this Act it is declared competent to the Court on the application of trustees under any trust (and therefore of a factor

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[1] *Maguire* v. *Tod*, 1899, 1 F. 1069. [2] *Callender* (*Mackie's J.F.*), 1920, 2 S.L.T. 95.
[3] Irons, p. 326. [4] *Dunbar*, 1876, 3 R. 554.
[5] Note *Nicholson* (*Mrs. Robertson's C.B.*), 22nd July 1920, Minute Book, vol. 139, p. 372.
[6] *Hamilton's Tutors*, 1924, S.L.T. 229. [7] *Anderson's Trs.*, 1921, 1 S.L.T. 186.
[8] Note *Pagan Blair's C.B.*, 4th March 1921, Lord Ashmore, Minute Book, 1920–21, p. 197.
[9] *M'Leay and Ors.*, 1921, 1 S.L.T. 340; *Boag and Ors.* v. *Walkinshaw*, 1872, 10 M. 872.
[10] *Darwin's Trs., Petrs.*, 1924, S.L.T. 778. [11] *Pennycuick*, 1925, S.L.T. 362.
[12] *Browning's J.F.*, 1905, 7 F. 1037. [13] *Brodie Steven's J.F.*, 1907, 15 S.L.T. 17.
[14] 11 & 12 Geo. V. c. 58; *Darwin's Trs., supra.*

as trustee within the meaning of the Act [1]) to grant authority to the trustees to do any of the acts mentioned in the section of the Act relating to general powers of trustees, notwithstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust. In this section the expression "trust" does not include any trust constituted by private or local Act of Parliament, and the expression trustees is to be construed accordingly.

Subsection (4).—*Special Powers to recover Estate.*

1133. It is occasionally necessary for the factor to apply to the Court for a special order for delivery of papers and documents when the trustees whom he has superseded or other parties prove recalcitrant. An order will be readily given on the factor's statement, and if the parties continue obdurate, and when a warrant to imprison might not be effectual or might involve delay, the Inner House may on the report of the Lord Ordinary grant a warrant to messengers-at-arms to search for and recover the documents, and if necessary to open and shut lock-fast places.[2]

1134. In the case of an interim factor appointed under s. 14 of the Bankruptcy (Scotland) Act, 1913, to conserve the estate of an alleged bankrupt, the alleged bankrupt refused to recognise the factor's authority and set him at defiance. A note setting forth the circumstances was lodged the following day, 19th March, and the Lord Ordinary reported verbally to the Division on the same day in view of the Court rising for the spring vacation. The Division made an order upon the alleged bankrupt to deliver possession of his business premises and estate instantly, and failing his instantly obtempering that order granted warrant to messengers-at-arms and sheriff officers to take possession of the said premises and estate and deliver them to the factor, and remitted to the Lord Ordinary on the Bills in vacation with power to summon the alleged bankrupt before him, and if necessary to grant an order for his apprehension and imprisonment.[3]

Subsection (5).—*Applications with Reference to Person of Ward.*

1135. A factor *loco tutoris* or a *curator bonis* has not *virtute officii* the charge of the ward's person, but it is within the competency of the Court to see that the person of the ward is properly cared for, and it will accordingly when necessary give such an order regarding the person and custody of the ward as may seem just.[4]

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[1] See para. 1115, *supra*.
[2] *M'Alley's J.F.*, 1900, 2 F. 1198; *Romanes* (*Ferguson's C.B.*), 1905, 7 F. 898.
[3] *Neilson's J.F.*, 1927, S.L.T. 423.
[4] *Maconochie*, 1857, 19 D. 366, at p. 371; *Gardiner's C.B.*, 1869, 7 M. 1130.

SUBSECTION (6).—*Procedure.*

1136. The application for special powers is by petition or note to the Junior Lord Ordinary.[1] Sec. 25 of the Trusts (Scotland) Act, 1921, provides that application for authority to complete title of a judicial factor to any trust property or estate may be contained in the petition for appointment, and such application may include moveable or personal property.[2] In practice it is not unusual to combine with the application to complete title a crave for authority to sell, when that is considered necessary, but as already explained, these applications, except when authority to complete title is sought under s. 44 of the Conveyancing (Scotland) Act, 1874,[3] are not dealt with until the factor has found caution and indicated his approval or adoption of the application.[4]

1137. Where the procedure is by note the factor is petitioner, and he should, before presenting the note, report to the Accountant of Court, and obtain from him an opinion on the powers asked, which report and opinion should be printed as an appendix to the note.[5] In practice this rule has been relaxed, and a note may be presented without the report and opinion,[6] but in that case, as in the case of applications made in the petition, a remit will be made to the Accountant of Court to inquire into the facts stated in the note and to report.[7] Where the application is made for the powers mentioned in s. 7 of the Pupils Protection Act, the procedure therein laid down should be followed.[8]

1138. The note must be printed and boxed, and intimated on the Walls and in the Minute-Book, and served on all parties interested, including the original petitioners and the cautioner for the factor, as in the case of a petition.[9] The name and date of the original petition should be stated in the note,[10] and prior applications in the process should be noted on the right-hand corner of the title-page of the print, with the respective dates of boxing and a distinctive letter of the alphabet printed in large type at the top of said page.[11] The Lord Ordinary does not necessarily follow the advice of the Accountant of Court given in his report or opinion, and special powers have been both granted[12] and refused[13] contrary thereto.

1139. Where any incidental petition or note in a factory is presented to the Junior Lord Ordinary in cases where the appointment of the judicial factor has been made by either Division of the Court, and the original proceedings have remained at the office of the clerk of the Division, the latter is authorised and directed to transmit the said original proceedings to the clerk of the Junior Lord Ordinary; and the

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[1] Maclaren, Bill Chamber Practice, p. 114; 20 & 21 Vict. c. 56, s. 4 (4) and (5); *Dow, Petr.*, 1910 S.C. 273.
[2] 11 & 12 Geo. V. c. 58, s. 25.
[3] 37 & 38 Vict. c. 94.
[4] See para. 1125, *supra.*
[5] 12 & 13 Vict. c. 51, s. 7.
[6] *Mackenzie*, 1862, 24 D. 844.
[7] *Gillespie's J.F.*, 1902, 9 S.L.T. 421.
[8] 12 & 13 Vict. c. 51, s. 7; *Mackenzie, supra.*
[9] 12 & 13 Vict. c. 51, s. 8.
[10] *Scott, Petr.*, 1856, 18 D. 323.
[11] C.A.S., A, iii. 5.
[12] *Young*, 1905, 43 S.L.R. 648.
[13] *Gilligan's J.F.*, 1898, 25 R. 876.

last-mentioned clerk is authorised and directed to transmit of new, when required, the whole proceedings to the clerk of such Division.[1] The clerks of Court are authorised and directed to transmit to the Accountant of Court, at all times, on his requisition, the proceedings, or such part thereof as he may require, in all processes of judicial factory or other processes relative thereto depending in the Court, in so far as such proceedings may not, at the time, be required for the use of the Court.[2]

Section 9.—Termination of Factory, Recall and Discharge.

1140. Where the duties of the judicial factor have terminated by lapse of time, as by a minor ward attaining majority, or by the death of the ward, or the exhaustion of the estate under the factor's charge by payment of debt or distribution among the parties entitled thereto, it is not usual to ask for recall; a simple petition for discharge is sufficient.[3] A factor *loco tutoris* becomes *ipso facto* a *curator bonis* on his ward attaining minority.[4]

1141. If a recall of the appointment of a factor is sought on the ground of age, ill health, or otherwise the petition will be for recall of the appointment, appointment of new factor, and discharge of the present factor. It may be at the instance of the factor himself or any other persons interested. In other cases the petition will be for recall of factory or curatory, and of the appointment of the factor, and for his discharge.

1142. With a petition for recall of curatory in the case of an *incapax* who has recovered, two medical certificates by independent doctors certifying his recovery should be lodged.[5] The petition will be served on the *curator bonis*, the petitioners in the petition in which the appointment was made, and any parties interested unless these are petitioners or consenters. In the event of opposition the procedure will be the same as in the case of a contested appointment.[6] The return of the absent person terminates the appointment of a factor *loco absentis*, but it is necessary to crave for recall of the factory and of the appointment of the factor as well as discharge in order that a date may be fixed down to which the factor's accounts must be lodged with the Accountant of Court.[7] After the death of his ward a factor *loco tutoris* was allowed as factor to proceed with an action against the mother of the ward for expenses occasioned by her.[8]

1143. These petitions are all competent before the Junior Lord Ordinary. In the early practice under the Distribution of Business Act uncertainty with regard to petitions for recall existed, recall not

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[1] C.A.S., G, i. 7. [2] *Ibid.*, 2. [3] *Edmond*, 1856, 15 D. 521.
[4] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39), s. 11.
[5] *Forster*, 1848, 11 D. 1031; *Forsyth*, 1862, 24 D. 1435; *Lawson*, 1863, 2 M. 355.
[6] *Inglis* v. *Inglis*, 1927 S.N. 181.
[7] *Craig* (*Gorman's Factor*) v. *Accountant of Court*, 1907, 15 S.L.T. 645.
[8] *Paul* v. *Gordon*, 1841, 3 D. 1145.

being specified in the statute, and many of the appointments having been made in the Inner House, but the question was finally settled in 1890, when the Second Division, after consultation with the judges of the First Division, held that such a petition is incompetent in the Inner House and must be presented to the Junior Lord Ordinary.[1] A petition for removal of a judicial factor is competent before the Junior Lord Ordinary,[2] and in a case of delict the appropriateness of a petition for recall has been criticised.[3] A factor guilty of malversation may be removed from office on a petition and complaint presented to the Inner House.[4] A petition for recall of an appointment made in the Sheriff Court in terms of the Judicial Factors (Scotland) Act, 1880, should be presented to the Junior Lord Ordinary.[5]

1144. No discharge can be granted until the factor's accounts have been submitted to the Accountant and reported on by him. The procedure regarding printing and boxing, lodging intimation, and service is the same as in petitions for appointment or notes for special powers.

Section 10.—Report and Review.

1145. The Distribution of Business Act, 1857,[6] contains special provisions regarding report of the Lord Ordinary to the Inner House, and regarding review of the Lord Ordinary's judgments in all petitions and applications falling within its scope.

Subsection (1).—*Report.*

1146. The Lord Ordinary may, in special cases, if he see cause, report an application to the Inner House, who may thereupon dispose of the same or give such instructions thereanent to the Lord Ordinary as they may deem proper.[7] An interlocutor on the merits pronounced in terms of instructions on report cannot be reclaimed against.[8]

Subsection (2).—*Review.*

1147. It is not competent to reclaim against an interlocutor that does not finally dispose of an application on the merits,[9] but a reclaiming note is competent against an interlocutor disposing partially of the merits,[10] and if such an interlocutor is not reclaimed against within the

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[1] *Souter* v. *Finlay*, 1890, 18 R. 86; *Tweedie*, 1886, 14 R. 212; *Kyle*, 1862, 24 D. 1083; *Sinclair*, 23 S.L.R. 737; *Masterton* v. *Erskine's Trs.*, 1887, 14 R. 712; *Craig* v. *Accountant of Court*, 1907, 15 S.L.T. 645; 20 & 21 Vict. c. 56, s. 4 (4).

[2] *Marshall* v. *Chisholm*, 1901, 3 F. 642; *Forrest* v. *Forrest's J.F.*, 1898, 6 S.L.T. 68.

[3] *Fisher* v. *Tod*, 1865, 3 M. 899.

[4] 12 & 13 Vict. c. 51, s. 21; *Mackenzie* v. *Gibson*, 1845, 7 D. 560.

[5] 43 & 44 Vict. c. 4, s. 4 (9); 52 & 53 Vict. c. 39, s. 14; *Forrest* v. *Forrest's J.F.*, 1898, 6 S.L.T. 68.

[6] 20 & 21 Vict. c. 56. [7] *Ibid.*, s. 5. [8] *Ibid.*, s. 6.

[9] *Ibid.*, s. 6; Maclaren, Bill Chamber Practice, p. 120; *M'Nab* v. *M'Nab*, 1871, 10 M. 248.

[10] *Clark* v. *Barr's Trs.*, 1903, 5 F. 856; *Macqueen* v. *Tod*, 1899, 1 F. 859.

prescribed period it cannot be opened up by a reclaiming note against a later interlocutor on the merits.[1] An appointment made in absence may be reclaimed against.[2]

1148. During session a reclaiming note must be boxed within eight days of the interlocutor reclaimed against,[3] and in vacation the reclaiming note must be lodged with the clerk in the Inner House within eight days and boxed on the first box day thereafter, and if there be no such box day on the first ensuing sederunt day.[4] While it has been decided that s. 52 of the Court of Session Act, 1868, does not apply to reclaiming notes under s. 6 of the Distribution of Business Act, 1857,[5] it has been held that s. 94 of the Act of 1868 applies to petitions under the Act of 1857, that an interlocutor in a cause heard during session may be signed by the Junior Lord Ordinary during vacation, and that the reclaiming days fixed in that section apply to such interlocutor.[6] That is to say, when such interlocutor is dated at or prior to the first box day in vacation the same may be reclaimed against on the second box day, and when the interlocutor is dated after the first box day then on the first sederunt day ensuing or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor dated and signed during session. If in a reclaiming note the respondent objects to its competency the Court may consider the competency of the petition itself.[7]

Section 11.—Sheriff Court Appointments.

Subsection (1).—*Limits of Jurisdiction.*

1149. The Judicial Factors (Scotland) Act, 1880,[8] made it competent for Sheriffs or Sheriff-Substitutes to appoint judicial factors on estates the yearly value of which (heritable and moveable taken together) did not exceed £100, and conferred upon every Sheriff and Sheriff-Substitute the same powers and authorities with regard to these factories as under the Pupils Protection Act, 1849,[9] have and may be exercised by either Division of the Court of Session or the Lord Ordinary with regard to factors appointed in the Court of Session. In estimating the yearly value of the estate,[10] the yearly value of lands and heritages shall be taken to be the yearly rent or the value as entered in the Valuation Roll, and the yearly value of any moveable estate shall be taken to be

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[1] *Marquis of Queensberry's Trs.* v. *Douglas*, 1907 S.C. 924.

[2] *Sharp* v. *M'Call*, 1860, 23 D. 38.

[3] 20 & 21 Vict. c. 56, s. 6.

[4] Maclaren, Bill Chamber Practice, p. 120; *Stair* v. *Johnston*, 1875, 2 R. 701; but see C.A.S., D, i. 4; *Bain* v. *Allan*, 1884, 11 R. 650; *Ross* v. *Herdman*, 1918, 2 S.L.T. 24; *Countess Dowager of Seafield* v. *Kemp*, 1898, 25 R. 873.

[5] *Macqueen* v. *Tod*, 1899, 1 F. 859; *Clark* v. *Barr's Trs.*, 1903, 5 F. 856; *Marquis of Queensberry's Trs.*, 1907 S.C. 924.

[6] 31 & 32 Vict. c. 100, s. 94; *Grant Suttie's Tutors* v. *Viscountess Dalrymple*, 1883, 11 R. 3.

[7] *Wallace* v. *Whitelaw*, 1900, 2 F. 675.

[8] 43 & 44 Vict. c. 4.

[9] 12 & 13 Vict. c. 51.

[10] 43 & 44 Vict. c. 4, s. 4 (2).

the amount of the yearly interest on the estimated value of the same at 4 per cent. per annum, and the yearly value of any estate or portion thereof that cannot be ascertained in either of the foregoing manners shall be ascertained in such manner as the Sheriff or Sheriff-Substitute shall think fit. The Sheriff shall make a finding regarding the value of the estate in the interlocutor making the appointment, which finding shall be final.[1]

1150. The term judicial factor is restricted in the definition section of the Act to factor *loco tutoris* and *curator bonis*.[2] The ward must be resident within the jurisdiction of the Sheriff Court in which the petition is presented.[3] This was held in the case of a lunatic married woman to be determined by the residence of her husband,[4] and in another case to be the last place where an insane person had his home.[5]

Subsection (2).—*Procedure.*

1151. Subject to such rules as may from time to time be made by Act of Sederunt, it is provided that the procedure shall be, as nearly as may be, in the same form and manner in which the like proceedings are taken before the Lord Ordinary.[6] The Act provides that the Accountant, when it appears to him that there is a diversity of judgment or practice in proceedings in judicial factories in the Sheriff Courts which it would be important to put an end to, may report the same to the First Division of the Court of Session, and ask for a rule to be laid down to secure uniformity in judgment and practice.[7] Decrees in absence shall not be opened up after the elapse of twelve months.[8]

1152. The petition must be intimated to the Accountant of Court,[9] who shall, in the event of an application for a similar appointment to the same lands or estate having been previously intimated to him, report the same to the sheriff-clerk. The time allowed for finding caution is three weeks from the date of appointment.[10] The bond of caution is approved by the sheriff-clerk,[11] and transmitted to the Accountant of Court.[12]

Subsection (3).—*Special Powers.*

1153. An application for special powers is made by report to the Accountant of Court,[13] and opinion thereon by him laid before the Sheriff, who disposes of the application.

Subsection (4).—*Recall and Review.*

1154. It shall be competent for the Sheriff or the Court of Session to recall any appointment made under the Judicial Factors (Scotland) Act, 1880.[14] In all cases of any appeal or reclaiming note being competent

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[1] 43 & 44 Vict. c. 4, s. 4 (3). [2] *Ibid.*, s. 3. [3] *Ibid.*, s. 4 (1).
[4] *Henry*, 1896, 12 Sh. Ct. Rep. 121. [5] *M'Cormick*, 1897, 13 Sh. Ct. Rep. 184.
[6] 43 & 44 Vict. c. 4, s. 4 (1), (6). [7] *Ibid.*, s. 4 (7). [8] *Ibid.*, s. 4 (8).
[9] C.A.S., L, viii. 4 and 5. [10] *Ibid.*, 6. [11] *Ibid.*, 8. [12] *Ibid.*, 9.
[13] *Ibid.*, 11. [14] 43 & 44 Vict. c. 4, s. 4 (9); *Forrest* v. *Forrest's J.F.*, 1898, 6 S.L.T. 68.

from a determination of the Lord Ordinary in the Court of Session to a Division of the Inner House, an appeal shall be competent in like cases from a determination by a Sheriff-Substitute to the Sheriff.[1] As to days allowed for appeal see the case undernoted.[2] The decision of the Sheriff in all cases under the Act of 1880 shall be final, and the decision of the Court of Session in all cases for recall of appointment under this Act shall be final.[3]

Subsection (5).—*New Appointment where Estate increases in Value above Sheriff Court Limit.*

1155. Where, after an appointment has been made in the Sheriff Court, the ward's estate increases in value, and through the death of the factor or otherwise a new appointment becomes necessary, and the estate at the date of the new appointment exceeds the value prescribed by the Act, it has been thought necessary that the new appointment should be made in the Court of Session. The petition is lodged in the usual way before the Junior Lord Ordinary, and after intimation to the sheriff-clerk an order is made for transmission of the Sheriff Court process to the Junior Lord Ordinary's office, and the processes conjoined *ob contingentiam* in terms of the Court of Session Act, 1868.[4]

Subsection (6).—*Appointments on Bankrupt Estates.*

1156. The appointment of a judicial factor on the estate of a deceased is now competent in the Sheriff Court under s. 163 of the Bankruptcy (Scotland) Act, 1913,[5] where the assets of the deceased are estimated not to exceed £500. The application must be made to the Sheriff of the sheriffdom within which the deceased resided or carried on business during the year immediately preceding the date of the petition or within which heritage belonging to the deceased at the time of his death is situated. An interim factor may also be appointed in a petition for sequestration under s. 14 of the said Act, as in the Court of Session.

Subsection (7).—*Other Appointments in Sheriff Court.*

1157. Sheriff Thoms, in his treatise on judicial factors, states the opinion that it is competent for the Sheriff to appoint a factor at common law where the appointment of an officer is necessary to enable the Sheriff to do justice in an action depending before him,[6] and illustrates this rule by the appointments of tutors and curators *ad litem*, and factors appointed to a pupil or minor executor. A tutor or curator *ad litem* does not fall under the definition of a factor nor under the provisions

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[1] 43 & 44 Vict. c. 4, s. 4 (5).
[2] *Paul* v. *Logan*, 1907, 18 Sh. Ct. Rep. 223.
[3] 43 & 44 Vict. c. 4, s. 4 (10).
[4] 31 & 32 Vict. c. 100, s. 74.
[5] 3 & 4 Geo. V. c. 20.
[6] Thoms, p. 515 *et seq.*; *Drysdale* v. *Lawson*, 1842, 4 D. 1061; *Rowe* v. *Rowe*, 1872, 9 S.L.R. 493; *Gibson* v. *Clark*, 1895, 23 R. 294.

of the Judicial Factors Acts, but a factor to a pupil or minor executor confirms as executor-dative in his own name, and does fall under the Judicial Factors Acts, and is subject to the supervision of the Accountant of Court.[1]

SUBSECTION (8).—*Discharge of Factor.*

1158. When a factor desires to be discharged he shall lodge a note in process, which the Sheriff shall order to be intimated and served on parties interested. The factor's application shall thereafter be sent to the Accountant,[2] who shall report his opinion to the Sheriff, who shall deal with and dispose of the application.

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[1] *Accountant of Court, Reporter*, 1907 S.C. 909. [2] C.A.S., L, viii. 12.

JUDICIAL REFERENCE.

See ARBITRATION.

JUDICIAL SEPARATION.

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Section 1.—History.

1159. This is the old *separatio quoad thorum* or *divortium a mensa et thoro* of the canon law.[1] Before the Reformation it was the law of Catholic Europe that marriage was indissoluble. Divorce *a vinculo* was not admitted. The Roman Catholic Church has never departed from the position that no Court of law can possibly dissolve the bond of marriage. But in Scotland divorce was introduced by the Reformers about 1560, and has been granted by the Courts since that time.[2] The Roman Church, while denying that a marriage could be dissolved, allowed that there were cases in which an injured spouse ought to have the right of living apart.[3] Upon proof of adultery, or *sævitia*, the Ecclesiastical Courts granted decree of separation or divorce *a mensa et thoro*.[4] This remedy has continued to exist side by side with divorce, and is commonly known as judicial separation. As before the Reformation it is granted for two causes only, namely, adultery, and *sævitia* or cruelty.

Section 2.—Separation on the Ground of Adultery.

1160. Where a spouse has been guilty of adultery, the other has an undoubted right to choose the remedy of separation instead of that of divorce.[5] It is often preferred, especially by wives of the poorer classes, for the reason that a conclusion for aliment can be inserted, and the husband, if decree is granted, will be ordained to aliment the wife during their joint lives. The wife of a poor man is, if she divorces him, thrown upon her own resources. Her claim to her legal rights which then emerges is worthless where the husband has no capital. For the nature

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[1] See Decret. Greg. IX. lib. 4, tit. xix. ; Liber Officialis S. Andree, No. 131.

[2] Fraser, H. & W. ii. 1139. [3] See Esmein, Le Mariage en Droit Canonique, i. 85.

[4] There are seventeen such decrees in the Liber Officialis S. Andree published by the Abbotsford Club, 1845, see, *e.g.*, Nos. 54 and 76.

[5] *Wilson* v. *Wilson*, 1866, 4 M. 732 ; *Symington* v. *Symington*, 1874, 1 R. 871 ; 2 R. (H.L.) 41.

of adultery and the evidence by which it is proved, see DIVORCE.[1] The same defences are in general competent in an action of judicial separation as in an action of divorce, and adultery connived at or condoned is not a ground of decree.[2]

SECTION 3.—SEPARATION ON THE GROUND OF CRUELTY.

SUBSECTION (1).—*What is Cruelty?*

1161. Cruelty has been thus defined: "Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health; these are by the law of Scotland and England a sufficient ground of divorce *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health, that too may be taken as regarded by the law of Scotland and by the law of England sufficient ground of divorce." [3] *Paterson* v. *Paterson* is the leading case in Scotland. In England it is *Evans* v. *Evans*.[4] Lopes and Lindley L.JJ. defined cruelty thus: "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it." [5] This definition was approved of in the House of Lords.[6] In another case Lord Watson said the husband must stop short of injuring the wife's "health of mind or body, or of rendering her existence intolerable." [7]

1162. There is an undoubted tendency to relax the strictness of the rule, and to regard as cruelty conduct which renders the existence of the other spouse intolerable, although there has been no such physical violence as to cause danger to life or limb, or, except indirectly, to health, and none such has been threatened.[8] But the judgment of the House of Lords in *Russell* [6] clearly affirms that danger to health is still the only test of cruelty. "Mere moral torture will not be sufficient." [9] But if it be shown that a course of tyranny is breaking the health of the other spouse, this may be enough.[10] One act of violence may be sufficient.[11] But there are many cases in which the Court would decline to give decree on account of a single act, if it was not of a very gross character and there was no reason to fear its repetition.[12] The issue is:

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[1] See Vol. VI., p. 6, *ante*.

[2] *Watson* v. *Watson*, 1874, 12 S.L.R. 78; *Smith* v. *Smith* (O.H.), 1904, 12 S.L.T. 341.

[3] Per Lord Brougham in *Paterson* v. *Paterson*, 1850, 7 Bell's App., 337, at p. 363, cited by Lord Pres. Inglis in *Graham* v. *Graham*, 1878, 5 R. at p. 1095.

[4] 1790, 1 Hag. Con. 35; see per Lopes L.J. in *Russell* v. *Russell*, [1895] P. 315, at p. 322.

[5] *Russell, supra*, at p. 332.

[6] *Russell* v. *Russell*, [1897] A.C. 395.

[7] *Mackenzie* v. *Mackenzie*, 1895, 22 R. (H.L.) 33, at p. 44.

[8] *Mackenzie* v. *Mackenzie*, 1892, 20 R. 686; 1895, 22 R. (H.L.) 33; *Kelly* v. *Kelly* 1870, L.R. 2 P. & D. 59; *Bethune* v. *Bethune*, [1891] P. 205; *Beauclerk* v. *Beauclerk*, [1891] P. 189; *Aubourg* v. *Aubourg*, 1896, 72 L.T. 295.

[9] *M'Gaan* v. *M'Gaan*, 1880, 8 R. 279, per Lord Justice-Clerk Moncreiff.

[10] *Kelly* and *Mackenzie, supra*.

[11] *Stewart* v. *Stewart*, 1870, 8 M. 821; *Mackenzie, supra*.

[12] See per Herschell L.C. in *Mackenzie* v. *Mackenzie*, 1895, 22 R. (H.L.) at p. 36; per Lord Shand in *Strain* v. *Strain*, 1885, 13 R. at p. 138.

Can the wife with safety continue to live with the husband?[1] It may be enough that violence is seriously threatened.[2]

1163. It is cruelty for one spouse recklessly to infect the other with venereal disease.[3] And this would probably be held of other diseases if the evidence showed a malicious intention to communicate them, or an utter recklessness as to the health of the other spouse.[4] Attempted intercourse by a husband who is aware and whose wife is also aware that he is suffering from venereal disease may amount to cruelty, although disease is not in fact communicated.[5]

1164. Formerly habitual intoxication was not cruelty.[6] But when coupled with such conduct as put the wife in reasonable fear of personal injury it might be a ground of decree.[7] Now, however, where it is established in a consistorial action that a husband or wife is a habitual drunkard as defined by the Habitual Drunkards Act, 1879,[8] such fact has the same legal consequences as cruelty and bodily violence.[9] The definition is: "A person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs."

1165. The fact that the husband is insane and has to be kept in restraint does not entitle the wife to judicial separation.[10] But where the insanity was recurrent, and the husband, though released from confinement, was liable to sudden attacks of mania, during which his wife was in danger, decree was pronounced.[11] The question whether persistent false charges that the other spouse has beeen guilty of gross offences amounted to cruelty was raised in the case of *Russell*,[12] and decided in the negative, there being no proof that the plaintiff's health was thereby endangered.[13] But where injury to health was averred, a persistent charge made against a wife of incest with her father was held to be a relevant charge of cruelty.[14]

Subsection (2).—*Cruelty by the Wife.*

1166. That which would be cruelty if committed by the husband on the wife is cruelty if committed by the wife on the husband. Nor is it

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[1] *Graham* v. *Graham*, 1878, 5 R. 1093, per Lord Pres. Inglis at p. 1095.

[2] *Evans* v. *Evans*, 1790, 1 Hag. Con. 33, per Lord Stowell at p. 40; *Mackenzie*, *supra*.

[3] *Strain* v. *Strain*, 1885, 13 R. 132; *Browning* v. *Browning*, [1911] P. 161.

[4] See *Chesnutt* v. *Chesnutt*, 1854, 1 Spinks at p. 205; *R.* v. *Clarence*, 1888, 22 Q.B.D. at p. 52. [5] *Foster* v. *Foster*, [1921] P. 438; cf. *Popkin* v. *Popkin*, 1794, 1 Hag. Ec. 768 n.

[6] *Fulton* v. *Fulton*, 1850, 12 D. 1104.

[7] *M'Gaan* v. *M'Gaan*, 1880, 8 R. 279. [8] 42 & 43 Vict. c. 19, s. 3.

[9] 3 Edw. VII. c. 25; *Isles* v. *Isles*, 1906 (O.H.), 14 S.L.T. 118; *A. B.* v. *C. D.* (O.H.), 1911, 1 S.L.T. 407; cf. *Z. Y.* v. *Z. Y.* (O.H.), 1911, 1 S.L.T. 459 (decree refused).

[10] *Steuart* v. *Steuart*, 1870, 8 M. 821, at pp. 828, 831; *Hall* v. *Hall*, 1864, 33 L.J. P. & M.6 5.

[11] *Hanbury* v. *Hanbury*, [1892] P. 222; see *Curtis* v. *Curtis*, 1858, 1 Sw. & Tr. at p. 213.

[12] [1895] P. 315; [1897] A.C. 395.

[13] See *Moir* v. *Moir*, 1751, 6 Pat. Supp. 688; *s.c.* Elch. *voce* "H. & W." No. 35; Fraser, H. & W. ii. 896. [14] *Aitchison* v. *Aitchison* (O.H.), 1901, 10 S.L.T. 331.

in this case necessary to prove that the husband incurred actual danger to life or limb. If the wife attacks the husband in such a way that he is driven to violence in self-defence, it may be her safety that is the more endangered, but she is guilty of cruelty.[1] Lord Kincairney thought he was entitled to consider the danger to the children in being left in the charge of a violent mother.[2] The fact that the wife was the offender does not relieve the husband of his liability to aliment her.[2]

Subsection (3).—*Condonation of Cruelty.*

1167. The phrase condonation of cruelty, or *remissio injuræ*, is sometimes used, though it is not very accurate. Forgiveness of a particular act of cruelty, and continuation of or return to cohabitation, will prevent this act being in itself sufficient to entitle the wife to decree. But any subsequent acts will justify her in opening up the whole history of the married life, and she will not be barred from proving those of earlier date which were at the time forgiven.[3]

Subsection (4).—*Other Defences.*

1168. *Mora* will not, in general, be a bar where the spouses are apart, and return to cohabitation would not be safe.[4] The action is not barred by adultery of the pursuer.[5] It is no defence that the wife has been a party to a contract of voluntary separation.[6]

Section 4.—Effects of the Decree.

1169. The decree does not dissolve the bond of marriage or enable the parties to contract another marriage, but it entitles the innocent spouse to live apart. The Conjugal Rights Act, 1861,[7] provided that after a decree obtained by the wife the *jus mariti* and husband's right of administration should be excluded from all property acquired by her subsequent to the decree, and such property might be disposed of by her in all respects as if she were unmarried, and on her decease, if she die intestate, it should pass to her heirs and representatives as if her husband had been then dead, and that if she should again cohabit with her husband, all such property as she might be entitled to when such cohabitation took place should be held to her separate use, exclusive of the *jus mariti* and right of administration of her husband, subject, however,

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[1] *Furlonger* v. *Furlonger*, 1847, 5 N. of C. 422; *Forth* v. *Forth*, 1867, 36 L.J. P. & M. 122; see *Russell* v. *Russell*, [1895] P. 315, at p. 328.

[2] *Nisbet* v. *Nisbet* (O.H.), 1896, 34 S.L.R. 229; 4 S.L.T. 142.

[3] *Graham* v. *Graham*, 1878, 5 R. 1093; *Martin* v. *Martin*, 1896, 3 S.L.T. 150, per Lord Kincairney; *Smeaton* v. *Smeaton*, 1900, 2 F. 837; *Moss* v. *Moss*, [1916] P. 155.

[4] *Cooke* v. *Cooke*, 1863, 3 Sw. & Tr. 126.

[5] *Taylor* v. *Taylor* (O.H.), 1903, 11 S.L.T. 487.

[6] *Lawson* v. *Lawson*, 1797, Mor. 6157; *Martin*, *supra*; Fraser, H. & W. ii. 914; Bell's Prin., s. 1544.

[7] 24 & 25 Vict. c. 86.

to any agreement in writing made between herself and her husband; and that the wife, while so separate, should be capable of entering into obligations and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married, and her husband should not be liable in respect of any obligation or contract she might have entered into, or for any wrongful act or omission by her, or for any costs she might incur as pursuer or defender of any action, after the date of the decree of separation and during the subsistence thereof; but that where, upon any such separation, aliment has been decreed or ordered to be paid to the wife, and not duly paid by the husband, he should be liable for necessaries supplied for her use. The powers conferred by this enactment upon a wife who has obtained a decree of judicial separation are now common to all married women, since the passing of the Married Women's Property (Scotland) Act, 1920.[1] But the provision regarding the succession to her estate on intestacy is still peculiar to a wife who has obtained such a decree.

1170. Subject to the above provisions of the Conjugal Rights Act, reconciliation of the spouses and return to cohabitation puts an end to the effects of the decree, and restores the spouses to their former position.[2] But the Court will not recall the decree at the instance of the offender, or allow proof that cohabitation would no longer be dangerous to the other.[3]

Section 5.—Jurisdiction.

1171. Actions of separation and aliment may be brought in the Court of Session if the spouses are domiciled in Scotland.[4] In England it is now settled that residence without domicile may be a sufficient ground of jurisdiction.[5] It is thought that the English decisions would be followed in Scotland, and that jurisdiction would be sustained where the parties were both resident in Scotland otherwise than as visitors or travellers, or if the wife were residing in Scotland and the husband came to Scotland and so acted that she required protection.[6]

1172. Actions of separation and aliment may now be brought in the Sheriff Courts.[7] The Sheriff may remit the action at any stage to the Court of Session, but should not do so unless in an exceptional case. The Court may remit back to the Sheriff.[8]

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[1] 10 & 11 Geo. V. c. 64.

[2] Fraser, H. & W. ii. 908.

[3] *Strain* v. *Strain*, 1890, 17 R. 297.

[4] *Hood* v. *Hood*, 1897, 24 R. 973.

[5] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, per Lord Watson at pp. 527, 531; *Christian* v. *Christian*, 1897, 78 L.T. 86; *Armytage* v. *Armytage*, [1898] P. 178; *Eckhardstein* v. *Eckhardstein*, 1907, 23 T.L.R. 364, 539; *Anghinelli* v. *Anghinelli*, [1918] P. 247.

[6] See Duncan and Dykes on Jurisdiction, p. 182.

[7] 7 Edw. VII. c. 51, s. 5.

[8] *Dunbar* v. *Dunbar*, 1912 S.C. 19.

JUDICIO SISTI.

See CAUTION.

JURAT.

See AFFIDAVIT.

JURATORY CAUTION.

See CAUTION.

JURISDICTION.

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Section 1.—Introductory.

1173. The scope and purpose of this article are limited to the determination of the question whether the Scottish Courts have jurisdiction to try cases brought before them. The partition of cases among the Courts of the country—the decision whether a case may be brought in an inferior Court or only in the Supreme Court—is beyond its scope. It deals only with that branch of International Private Law which has to answer the question—In what *forum* may a person be sued? The authorities from which an answer to this question have to be drawn are found mainly in the decisions of the Supreme Courts of Scotland. The principles on which the rules are based are indeed, for the most part, *juris gentium*, and are recognised, with minor variations, in the laws of most civilised countries. It follows that these principles rule similar questions where they arise in the inferior Courts, no less than in the Supreme Court; but in the former they are to a greater extent interpreted and enforced by statute law. The jurisdiction of the Sheriff Court in Scotland is now mainly governed by the provisions of the Sheriff Courts (Scotland) Act, 1907, s. 6.[1] The various grounds of jurisdiction there enumerated are closely modelled on the recognised grounds of jurisdiction established by judicial decision in the Court of Session, and should probably be interpreted, and perhaps limited, by the rules of the common law. On the other hand, in the Court of Session the rules of jurisdiction have been developed over a period of centuries, with practically no intervention

General Authority.—Duncan and Dykes, Principles of Civil Jurisdiction.

[1] 7 Edw. VII. c. 51, as amended by 2 & 3 Geo. V. c. 28.

of the legislature; and in the course of that development there may be traced the influence of all those great schools of jurisprudence—Roman, Continental, and English—which have shared in moulding the common law of Scotland. Moreover, in this, as in other branches of international law, there is still to be found a notable influence exercised by jurists and theoretical writers on legal science, whose influence in this department of law is conceded by the Bench largely with a view to establishing, as far as may be, some degree of uniformity in the practice of the Courts in different countries.

Section 2.—Definition.

1174. Jurisdiction is defined by Erskine [1] as "a power conferred on a judge or magistrate to take cognisance of and determine debateable questions according to law, and to carry his sentences into execution." It is derived from the Sovereign power, and is granted with reference to, and limited by, the bounds of a particular territory.[2] It would appear to follow that questions of jurisdiction must depend broadly upon whether or not the Court can pronounce a judgment which will be effective within its territory. This principle will be found to underlie the rules which have been followed by the Courts of Scotland. It therefore affords a convenient means of classifying the different grounds of jurisdiction. The "territory" of the Court of Session includes the mainland and islands of Scotland, together with the adjacent territorial waters. The latter extend to one marine league from low-water mark, and include all inlets of the sea, *inter fauces terrae*.[3] By statute the jurisdiction of the Sheriff Court is declared to "extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdom." [4]

Subsection (1).—*The Principle of Effectiveness.*

1175. This territorial character of jurisdiction leads to the primary rule that a pursuer must bring his action in a Court to which the defender is subject. *Actor sequitur forum rei.* "It imports nothing where the pursuer hath his domicile, for he must follow that of the defender, since no defender is obliged to appear before a Court to which the law hath not subjected him." [5] The problem of jurisdiction is, therefore, to find the *forum rei*; and, from the principle of effectiveness stated above, it follows that the *forum rei* will depend to some extent on the nature of the remedy which is sought.

1176. In actions which seek for a personal decree, the judgment, to be effective, must be enforced against the person or property of the defender. From this it follows that the ground of jurisdiction in such

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[1] i. 2. 2.
[2] Ersk. i. 2, 3.
[3] Stair, ii. 1, 5; *Mortensen* v. *Peters*, 1906, 8 F. (J.) 93.
[4] Sheriff Courts (Scotland) Act, 1907, s. 4.
[5] Erskine, Inst. i. 2, 16; *cf.* Lord Kames, Law Tracts, 1761, p. 232 *et seq.*

cases must be looked for in the presence, more or less permanent, of the defender within the territory, or in the presence there of property belonging to him, either heritable property or personal property fixed there by arrestment, against which the judgment may be enforced. There are other actions in which no personal decree is sought, but which are brought to declare or regulate rights in property situated within the territory. In these cases the effectiveness of the judgment of the Court depends upon the presence of that property within the territory. Actions in which the decree sought will primarily and principally affect the status of the pursuer or defender are naturally competent to the Courts of the country in which the person whose status is to be effected has his domicile, because the judgment of these Courts will effectively regulate his status within the community to which he belongs.

Subsection (2).—*The Principle of Submission.*

1177. To this principle of effectiveness must be added the other principle by which the validity of any ground of jurisdiction may be tested. A party over whom a Court would otherwise have no jurisdiction may voluntarily submit himself thereto, and he is then debarred from challenging the validity of its decrees on the ground of want of jurisdiction. This is known as the principle of submission, and will be exemplified in the section on prorogation [1] and also, to some extent, in that on reconvention.[2]

Subsection (3).—*Classification of Subject.*

1178. From these considerations there follows a division of the subject into: I. Jurisdiction in personal actions. II. In real actions. III. In actions on status. There must be added to these certain classes of cases in which jurisdiction depends upon similar considerations, but which present peculiarities requiring separate treatment, viz.: IV. Jurisdiction in bankruptcy. V. In the winding up of joint-stock companies. VI. In succession and in administration of trusts. VII. Jurisdiction by reconvention. VIII. By prorogation, and IX. Criminal jurisdiction.

Section 3.—Jurisdiction in Personal Actions.

1179. The grounds of jurisdiction in these actions fall under six heads: 1. Residence. 2. Contract or delict coupled with personal citation. 3. Mere presence of itinerants. 4. Possession of heritage. 5. Arrestment of moveables. 6. Arrest *in meditatione fugæ.*

Subsection (1).—*Residence.*

1180. The law of Scotland does not recognise the mere presence of a defender within the territory as sufficient in itself to confer jurisdiction,

[1] See para. 1210, *infra.* [2] See para. 1205, *infra.*

except in a limited class of cases, which will be noticed later. In the ordinary case, what is required is that the defender shall be resident in Scotland. As the nature of the residence which is to be deemed sufficient requires definition, the constant practice of the Scots Courts "has fixed that a residence of forty days is sufficient—not mere presence within the territory, travelling about and never fixed in any one place—but continuous residence in one locality for forty days." [1] It is inconsistent with the views of Lord Justice-Clerk Inglis, here expounded, to maintain, as does Mr. Nicolson in his Notes to Erskine's Institutes,[2] that jurisdiction will arise before the expiry of forty days if the residence be taken up *animo remanendi*. But it is not necessary that the forty days be absolutely continuous, provided the interruptions do not take off its character of substantial continuity.[3]

1181. As this jurisdiction depends upon residence, it ceases where the defender has left the realm before proceedings have been raised. In *Johnston* v. *Strachan* [4] the defender, who was ordinarily resident in America, had resided in a hired house in Scotland for the summer of 1859. He went to England in November, and within forty days of departure an action was served on him at the house in which he had resided in Scotland. Lord Kinloch, who was the Lord Ordinary, said, with reference to this ground of jurisdiction: "The jurisdiction in such a case does not rest on permanent settlement, or the possession by the individual of a house of his own. It rests exclusively on residence within the country for the appointed period. It is personal presence within the realm which forms the important element. It seems . . . to follow, from the principle on which the jurisdiction is in such a case founded, that the cessation of personal presence, by departure from the realm before judicial proceedings are raised, at once puts an end to the jurisdiction." In the Inner House the plea, so far as founded on residence, was abandoned as untenable. The facts of this case have been noticed thus at some length, because it has been stated by various text writers that this jurisdiction, founded upon residence, continues if the defender has not been absent for forty days,[5] and these views were followed by Lord Stormonth-Darling in the Outer House in 1891,[6] when the Inner House expressly refrained from expressing any opinion on the point. The writers referred to cite as their authority the case of *Calder* v. *Wood*.[7] But that case only decided that a person who had resided for the necessary period and had

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[1] Lord Justice-Clerk Inglis in *Joel* v. *Gill*, 1859, 21 D. 929, at p. 939; Ersk. i. 2, 16; *Paterson* v. *Fermour*, 1672, Mor. 3724; *Calder* v. *Wood*, 19th January 1798, F.C.; Mor. 2250; Lord Fullerton in *Ringer* v. *Churchill*, 1840, 2 D. 307.

[2] Vol. i. p. 35.

[3] *Ritchie* v. *Fraser*, 1852, 15 D. 205, per Lord Pres. M'Neill at p. 208.

[4] 1861, 23 D. 758.

[5] Mackay, Practice, i. 166; Manual, p. 54; Rankine's Ersk. Prin. i. 2, 9; Dove Wilson, Sheriff Court Practice, p. 67.

[6] *International Exhibition* v. *Bapty*, 1891, 18 R. 843.

[7] 19th January 1798, F.C.; Mor. 2250.

left his residence, but not the country, was lawfully *cited* at his residence. It did not decide that a person who has quitted the country can remain subject to the jurisdiction on the ground of residence, and the case of *Johnston* is conclusive against such a proposition. The misconception into which these writers have fallen appears to have been induced by the terms of the Judicature Act, 1825,[1] which provides that "where a person, not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence, and have been therefrom absent during the space of forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged and cited according to the forms herein prescribed," *i.e.* by edictal citation; and of the previous Act of Sederunt, December 14, 1805, s. 1, which provided that a person in these circumstances should be held and presumed after such absence, but not sooner, to be furth of Scotland. But these enactments merely direct the manner in which persons may be cited, and the presumption which may operate to determine which manner shall be adopted. They cannot in any way affect the question whether the person cited is subject to the jurisdiction of the Court on the ground of residence. That question depends upon whether the defender is resident,[2] and has been so for the requisite period; and, as is pointed out by Lord Justice-Clerk Inglis in *Joel* v. *Gill*,[3] citation has nothing to do with the founding of jurisdiction. Residence is one of the grounds of "universal jurisdiction"; that is to say, it founds jurisdiction for all actions of a personal or pecuniary nature.[4]

1182. Contrary to views which were once held, the Scottish Courts will not exercise jurisdiction in personal actions in virtue of the defender's birth or domicile of origin in Scotland,[5] nor of his subsisting Scots domicile.[6] Even when a Scottish domicile of origin is conjoined with personal citation in Scotland there is no jurisdiction.[7] In *Corporation of Glasgow* v. *Johnston*,[8] the Court seems to have affirmed the view that the conjunction of a cause of action in Scotland and a subsisting Scottish domicile of the defender (or perhaps even a Scottish domicile of origin) will involve personal jurisdiction, even though the defender be not in Scotland at the date of action. The divergent views expressed in the opinions of the judges make it difficult to extract any principle of law from the judgment.

1183. In the case of a firm or company the equivalent of residence is the so-called "trading domicile"; that is, the firm or company must have a place of business within the territory. It is not enough that a company or firm should do business there through an agent.[9]

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[1] 6 Geo. IV. c. 120, s. 53. [2] See *Wylie*, 1928, S.L.T. 665. [3] 1859, 21 D. at p. 939.
[4] See Lord Justice-Clerk Inglis in *Joel* v. *Gill*, 1859, 21 D. 929, at p. 938.
[5] *Pedie* v. *Grant*, 1825, 1 W. & S. 716.
[6] *Dicta* by Lord Justice-Clerk Macdonald and Lord Kyllachy in *Tasker* v. *Grieve*, 1905, 8 F. 45; and Lord Kyllachy in *Buchan* v. *Grimaldi*, 1905, 7 F. 917.
[7] *Tasker*, *supra*. [8] 1915 S.C. 555.
[9] *Bishop* v. *Mersey and Clyde Steam Navigation Co.*, 1830, 8 S. 558; *Laidlaw* v. *Provident Plate Glass Insurance Co., Ltd.*, 1890, 17 R. 544.

SUBSECTION (2).—*Contract or Delict coupled with Personal Citation.*

1184. When the cause of action has arisen in Scotland the Scots Courts have jurisdiction if the defender is personally cited in Scotland. The cause of action may be a contract, which was made or is to be performed in Scotland, and the action may be for specific performance or for damages for breach.[1] The cause of action may also be a wrong committed within the territory—jurisdiction *ratione delicti*.[2] The contract may have been made by an agent, and the wrong may have been committed by any person for whose acts the defender is responsible, but in any case the personal citation of the defender within the territory is essential.

1185. Some cases in which the mere presence of the defender in Scotland was held to be sufficient, without forty days' residence, were grouped in a class by themselves by Lord Mackenzie in *Ringer* v. *Churchill*,[3] viz. actions for aliment, for restitution of moveables, and for the price of goods sold for ready money. These, however, seem all to fall into one or other of the two classes already mentioned—jurisdiction *ratione contractus* and *ratione delicti*.

SUBSECTION (3).—*Mere Presence of Itinerants.*

1186. In the case of itinerants and persons having no fixed residence, mere presence within Scotland, certified by personal service of the summons there, will suffice to give jurisdiction to the Scots Courts, wherever the cause of action may have arisen.[4]

SUBSECTION (4).—*Possession of Heritage.*

1187. "The beneficial possession, whether natural or civil, of immoveable estate within the realm, whether permanently or temporarily, upon a good title of possession, is sufficient to found jurisdiction," not only in actions relating to that estate, but in all personal actions.[5] The rule of our law was so announced after a careful consideration of the whole authorities, and, as explained by the Lord President, is in accordance with "what has been generally laid down as a proper test of jurisdiction, that the decree can be made effectual within the territory." The basis of this ground of jurisdiction was similarly explained in previous cases.[6] The nature of the title on which the property is held is not important, so long as there is a beneficial interest which can be made the subject of an adjudication. Thus jurisdiction has been upheld

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[1] *Sinclair* v. *Smith*, 1860, 22 D. 1475; *Kermick* v. *Watson*, 1871, 9 M. 984; Bar, International Law (Gillespie's tr.), p. 917; Guthrie's Savigny, 2nd ed., 197.

[2] *Kermick* v. *Watson*, 1871, 9 M. 984.

[3] 1840, 2 D. 307.

[4] *M'Niven* v. *M'Kinnon*, 1834, 12 S. 453; *Linn* v. *Casadinos*, 1881, 8 R. 849.

[5] Per Lord Pres. Inglis in *Fraser* v. *Fraser and Hibbert*, 1870, 8 M. 400, at p. 404.

[6] *Ferrie & Fairley* v. *Woodward*, 1851, 9 S. 854; opinion of consulted judges at p. 855; Lord Fullerton in *M'Arthur* v. *M'Arthur*, 1842, 4 D. 354, at p. 362.

where the defender owned a defeasible mid-superiority;[1] where he had right to an estate as apparent heir, although he had neither made up titles nor entered into possession;[2] where he was a lessee of a house and shootings;[3] where the defender had conveyed away the estate, but the action was brought to reduce the conveyance as a fraud upon his creditors;[4] and where his property had been conveyed by the defender to marriage-contract trustees, to be held for his wife, and, if he survived, for himself in liferent and his children in fee, their right not to vest till survivance and majority, and the only part of the deed put on record was that which conveyed the estate to the trustees in trust "for the purposes afterspecified."[5] On the other hand, the mere feudal title, without beneficial interest, will not be sufficient. Thus where the defender had sold his property, but the disposition had not been recorded, it was held there was no jurisdiction.[6] But where there was no completed contract of sale, owing to the missives being improbative, the execution of a disposition which had not been delivered at the date of action was held insufficient to oust the jurisdiction over the seller.[7] Where the defenders are trustees, the possession of heritage by the trust will give jurisdiction against them *quâ* trustees.[8] But the possession of property by one of several trustees, though it would found jurisdiction against him as an individual, will not found jurisdiction against the trustees.[9] On principle there seems to be no doubt that the holder of a right in security over Scots heritage would be subject to the jurisdiction.[10]

Subsection (5).—*Arrestment of Moveables.*

1188. This ground of jurisdiction is based upon similar principles to the preceding. Heritable property being fixed *suâ naturâ* within the territory, remains open to the diligence of the Courts; but, in the case of moveables, these require to be arrested so as to fix them in the territory.[11] It is said to have been borrowed from Holland, where it was introduced from views of expediency and for the encouragement of commerce.[12] As a foundation of personal jurisdiction this form of arrestment was in use in Scotland from the seventeenth century, in particular for the recovery of debts from foreign merchants; it was recognised as a well-established doctrine of our law when it first came to be considered by the House of Lords in *London and North-Western Rly. Co.*

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[1] *Kirkpatrick* v. *Irvine*, 1838, 16 S. 1200; 1841, 2 Rob. 475.
[2] *M'Arthur* v. *M'Arthur*, 1842, 4 D. 354.
[3] *Fraser* v. *Fraser & Hibbert*, 1870, 8 M. 400.
[4] *Shaw* v. *Dow & Dobie*, 1869, 7 M. 449.
[5] *Smith* v. *Stuart*, 1894, 22 R. 130.
[6] *Bowman* v. *Wright*, 1877, 4 R. 322.
[7] *Dowie & Co.* v. *Tennant*, 1891, 18 R. 986.
[8] *Ferrie & Fairley* v. *Woodward*, 1831, 9 S. 854; *Charles* v. *Charles' Trs.*, 1868, 6 M. 772; *Kennedy* v. *Kennedy*, 1884, 12 R. 275; *Robertson's Tr.* v. *Nicholson*, 1888, 15 R. 914; *Ashburton* v. *Escombe*, 1892, 20 R. 187.
[9] *Hastie* v. *Steel*, 1886, 13 R. 843.
[10] See *Ashburton* v. *Escombe*, *supra*; *Love* v. *Love*, 1907 S.C. 728.
[11] Consulted judges in *Ferrie & Fairley* v. *Woodward*, 1831, 9 S. 854; Lord Fullerton in *M'Arthur* v. *M'Arthur*, *supra*, at p. 362.
[12] Consulted judges in *Cameron* v. *Chapman*, 1838, 16 S. 907, at p. 918.

v. *Lindsay*,[1] where interesting discussions of its history and principles are to be found in the speeches of Lord Chancellor Cranworth and Lord Brougham. Although generally regarded with disfavour by modern jurists on the ground of its departure from the principle—*actor sequitur forum rei*—it finds a place in many modern codes.[2] In other legal systems, however, the creditor's right is commonly restricted to obtaining a decree for the value of the property arrested, a limitation which may serve to assimilate it to the real jurisdiction which every Court enjoys over the property within its territory. This limitation does not apply in our law. The arrestment proceeds upon a warrant contained in the summons or upon letters passing the Signet. It may be used to attach any moveable property (corporeal or incorporeal) belonging to the defender in Scotland. The property, to be arrestable, must be in the hands of some person other than the defender, and not his servant. The sum or subject attached need not be commensurate in value with the sum sued for, but its value must not be "elusory." [3] "The sum of £1, 8s. 6d. is a substantial sum of money," said Lord Pres. Inglis, "and it is no objection to the jurisdiction that if decree were obtained in this action that sum will be all that the pursuer can recover to satisfy a claim of £800. Unless the thing arrested is really of no value at all, I think the smallness of the amount is no relevant objection to the foundation of jurisdiction." The jurisdiction thus founded exists only for the action in respect of which the arrestment is used,[4] and that action must be of a personal character, for payment or *ad factum præstandum*.[5]

1189. The effect of the arrestment in attaching the arrested property has been the subject of conflicting decisions of high authority. After various opinions had prevailed at different times, it seemed to be settled by the House of Lords in *North* v. *Stewart*[6] that the arrestment attached the subjects—"fixed their locality in Scotland"—until the defender was rendered amenable to the jurisdiction by service of the summons, and no longer. A later view, entirely irreconcilable with this, has since prevailed in the Court of Session, where it is now held that no *nexus* is created by the arrestment, and that the arrested subjects may be removed from the territory without any liability being incurred for breach of arrestment.[7] Jurisdiction by arrestment may now be founded in certain circumstances in the Sheriff Court.[8]

Subsection (6).—*Arrest* in meditatione fugæ.

1190. This method of constituting jurisdiction, now practically obsolete, consisted in arresting the defender on a warrant granted by

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[1] 1858, 3 Macq. 99; in C. of S., 22 D. 571.
[2] *Cf.* Juridical Review, 1889, vol. i. p. 54.
[3] *Shaw* v. *Dow & Dobie*, 1869, 7 M. 449. [4] *Anderson* v. *Harboe*, 1871, 10 M. 217.
[5] *Powell* v. *Mackenzie & Co.* (O.H.), 1900, 8 S.L.T. 182; see Voet, Comm., bk. ii. tit. iv. s. 25.
[6] 1890, 17 R. (H.L.) 60. [7] *Craig* v. *Brunsgaard, Kjosterud & Co.*, 1896, 23 R. 500.
[8] Sheriff Courts (Scotland) Act, 1907, s. 6 (*c*).

the Sheriff on the pursuer's representation that his debtor was *in meditatione fugæ*.[1] But such arrest was held to be incompetent in all cases in which imprisonment could not follow on the decree.[2] It followed that when the Debtors (Scotland) Act, 1880,[3] abolished imprisonment for debt except in a few cases (further reduced by the Civil Imprisonment (Scotland) Act, 1882[4]), the practical utility of this ground of jurisdiction was gone. It is probably competent in actions *ad factum præstandum*,[5] and in actions for taxes, fines, and penalties due to the Crown, but for the last three there are statutory methods of recovery, which in practice supersede common-law actions.

Section 4.—Jurisdiction in Real Actions.

1191. In actions which have for their purpose the determination of the right of possession or ownership of, or of other real rights in, heritage in Scotland, the Court has jurisdiction *ratione rei sitæ*, although the parties who may have to be called as defenders to the action are not otherwise subject to the jurisdiction.[6] It is the only Court competent to determine such rights, since it alone can give effective possessory judgments. It accordingly not only has jurisdiction, but exclusive jurisdiction.[7]

1192. It has been laid down by the House of Lords in an English case that the Courts where the property is situated have an exclusive jurisdiction, not only as regards all questions of title but also in actions of damages for trespass, if the question involved in such actions, and the rights of parties, depend on the title. The mere fact that the question is raised in an action of damages does not change its essential character. Accordingly, that Court refused to entertain an action of damages for trespass to lands situated abroad.[8] Where, however, the action, although relating to immoveables, is not a real or possessory action,[9] any Court to which the defender is subject in personal actions will be competent.[10] In this way the Court may indirectly affect the disposition of land situated abroad, as, for example, by ordaining the execution of an agreement relating thereto. Thus a boundary dispute concerning an estate in another country would not be within the jurisdiction of our Courts; but, if an agreement had been come to by the parties, our Courts would ordain a party over whom they had personal jurisdiction to implement his agreement.[11]

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[1] *Muir* v. *Collett*, 1861, 23 D. 1229.
[2] *A.* v. *B.*, 1843, 5 D. 1116; *Marshall* v. *Dobson*, 1844, 7 D. 232.
[3] 43 & 44 Vict. c. 34. [4] 45 & 46 Vict. c. 42. [5] Debtors (Scotland) Act, s. 4.
[6] Ersk. i. 2, 17; *Williamson* v. *Haigie*, 1635, Mor. 4815.
[7] Story, Conflict of Laws, 8th ed., ss. 551, 554; *Ashburton* v. *Escombe*, 1892, 20 R. 187.
[8] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602; see Lord Herschell's judgment.
[9] For definition see Blackburn J. in *Castrique* v. *Imrie*, 1870, L.R. 4 E. & I. App. 414, at pp. 427, 428.
[10] *Ruthven* v. *Ruthven* (O.H.), 1905, 43 S.L.R. 11; 13 S.L.T. 409; *Paget* v. *Ede*, 1874, L.R. 18 Eq. 118.
[11] *Cf.* Lord Chancellor Hardwicke in *Penn* v. *Lord Baltimore*, 1750, 1 Ves. Sen. 443.

1193. The same consideration of effectiveness which has established the exclusive jurisdiction of the *forum situs* in real actions relating to heritage is equally applicable to real actions in which the property in, or the possession of, moveables is in question. Accordingly the Courts of Scotland and of England exercise a real jurisdiction over moveables situated, however temporarily, in their territory.[1] A common instance of this real jurisdiction over moveables is found in actions of multiplepoinding, in which the fund or subject is placed *in manibus curiæ* for the purpose of determining the question of ownership among competing claimants.[2] But the commonest examples of the exercise of the real jurisdiction over moveables are to be found in Admiralty practice. Both in Scotland and in England the Courts have frequently exercised a jurisdiction to determine the ownership of, or real rights in, a ship in respect merely of the presence of the ship within their territory. And the jurisdiction which they claim for themselves they have recognised, and given effect to, when exercised by foreign Courts.[3]

1194. A real right may sometimes be vindicated by a process of interdict, which then becomes a real action, and the jurisdiction is determined accordingly.[4]

Section 5.—Jurisdiction in Actions on Status.

Subsection (1).—*Divorce.*

1195. While there are many actions in which the status of an individual may be in question, the action of divorce differs from all others in this, that in it the Court is asked to dissolve the marriage bond and thus to change the status of the individuals concerned. And as the status of an individual is determined by the law of his domicile, so the Courts which have jurisdiction to alter his status are the Courts of his domicile. The law both of England and of Scotland is now definitely settled by the case of *Le Mesurier*,[5] to the effect that the domicile of the parties is the sole ground of jurisdiction in cases of divorce. Thus, the view adopted in most foreign systems of law, that the law of the personal status depends on nationality, receives no recognition in this country; and the older Scottish view, that an habitual residence in a country—without that *animus manendi* which confers full rights of domicile for succession—may give a "matrimonial domicile" for purposes of divorce, is now entirely obsolete. Probably the only qualification of the rule that an existing domicile of succession is the only ground of jurisdiction for divorce is that involved in the supplementary rule that a husband cannot, by acquiring a new

[1] Lord Justice-Clerk Inglis in *Jones* v. *Samuel*, 1862, 24 D. 319; *Castrique* v. *Imrie*, 1870, L.R. 4 E. & I. App. 414; for a contrary view see Bar, Private International Law (Gillespie's tr.), p. 911.

[2] Maclaren, Court of Session Practice, p. 50.

[3] See *Jones*, *supra*, in Scotland, and *Castrique*, *supra*, in England; *Cammell* v. *Sewell*, 1858, 3 H. & N. 617, may also be referred to.

[4] Lord Justice-Clerk Inglis in *Jones*, *supra*.

[5] [1895] A.C. 517.

domicile after committing a matrimonial offence entitling his wife to divorce, defeat her right of action in the Courts of the former domicile.[1] But there is authority for the view that, after a wife has deserted her husband, he may subject her to the jurisdiction of the Courts of a new domicile which he has selected with the object of obtaining a divorce which the law of his former domicile would not have given him; and it perhaps makes no difference that the obtaining of a divorce was a substantial motive in the selection of the new domicile.[2] For it is now definitely determined by our Supreme Court of Appeal that husband and wife always have the same domicile, and that a husband always gives to his wife whatever domicile he may acquire for himself, whatever be the circumstances or motives of that acquisition.[3]

Subsection (2).—*Other Matrimonial Actions.*

1196. In other actions between spouses affecting their married status the rules of jurisdiction are not so clearly ascertained as in those where the purpose is the dissolution of the marriage. In declarators of marriage, and of nullity of marriage, the place of celebration of the alleged marriage may play a part in fixing the Court which will have jurisdiction; but, if the defender be not actually resident in Scotland, there must be citation of him there in addition to the Scottish *locus* of the marriage in order to confer jurisdiction on the Scottish Courts.[4] This ground of jurisdiction is probably, however, not exclusive, but alternative to that of the Court of the parties' domicile, which is the ordinary Court to determine their status. In the case of actions of separation the considerations which should determine the jurisdiction are not the same. The decree does not affect the status of the parties, but merely affords protection to the pursuer, and can be effective only in the country where the parties reside. The Scottish decisions are scanty and inconclusive.[5] It seems probable that there are alternative jurisdictions to be found in the Court of the parties' domicile and in the Court of the country in which they are for the time resident. English authorities are not entirely consistent;[6] but the preponderance of authority seems to be in support of the view suggested above. There is, moreover, the weighty opinion of the Judicial Committee in favour of denying any exclusive jurisdiction to the Court of the domicile. "It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment."[7] In declarators of legitimacy, jurisdiction

[1] *Manderson* v. *Sutherland*, 1899, 1 F. 621; *Redding* v. *Redding*, 1888, 15 R. 1102.
[2] *Carswell* v. *Carswell*, 1881, 8 R. 901.
[3] *Mackinnon's Trs.* v. *Inland Revenue*, 1920 S.C. (H.L.) 171.
[4] *Murison* v. *Murison*, 1923 S.C. 624, and cases there cited.
[5] *Hood* v. *Hood*, 1897, 24 R. 973; *Linder* v. *Linder* (O.H.), 1904, 11 S.L.T. 777.
[6] Contrast *Niboyet* v. *Niboyet*, 1878, 4 P.D. 1, with *Armytage* v. *Armytage*, [1898] P. 178, and cases there.
[7] Lord Watson in *Le Mesurier* v. *Le Mesurier*, [1895], A.C. 517, at p. 531.

exists both in the Court of the domicile and also in that of any country in which the pursuer may require to vindicate patrimonial rights which depend on the establishment of that status.[1] This is also the criterion of jurisdiction prescribed for English Courts by the English Legitimacy Declaration Act, 1858. It is not so clear whether the mere fact of residence will give an alternative jurisdiction.[2]

Section 6.—Jurisdiction in Bankruptcy.

1197. Jurisdiction to sequestrate the estates of an insolvent person is the creature of statute, and its scope must be determined by the construction of the statutory provisions. Sec. 11 of the Bankruptcy (Scotland) Act, 1913, repeats the provisions on this subject in s. 13 of the Act of 1856. The Scots Courts have jurisdiction to award sequestration of the estates of any living debtor, who is "subject to the jurisdiction of the Supreme Courts of Scotland," upon his own petition, with the concurrence of creditors to a certain amount. The law of jurisdiction in bankruptcy is therefore the result of the construction which the Courts have given to that provision. First, the term "debtor" includes individuals and also bodies corporate, but not companies incorporated under the Companies Acts, with reference to the winding up of which special statutory enactments are to found in those Acts.[3] Also, railway companies are in the special position that they are not subject to the ordinary rules of diligence and can be wound up only by Act of Parliament.[4] Secondly, the expression "subject to the jurisdiction of the Supreme Courts" has been interpreted to mean amenable to the jurisdiction against a debtor, that is, in ordinary civil actions; also, the civil jurisdiction is confined to that which is of a universal nature. Thus, grounds of jurisdiction available only for certain actions, such as arrestment, reconvention, etc., are not such as to be included in the statutory expression.[5] It results from these well-established rules, that the debtor who may be sequestrated by the Scottish Courts is one who could be sued for debt in those Courts. As the universal grounds of civil jurisdiction are forty days' residence (or an equivalent "trading domicile") and the ownership of Scottish heritage, these constitute the grounds of jurisdiction warranting the award of sequestration. It is irrelevant that the bankrupt has his domicile of succession in Scotland, since that would not subject him to jurisdiction in a personal action for debt, and is therefore no good ground for awarding sequestration under the statute.

1198. Where the petition is at the instance of creditors, not only must the debtor be subject to the jurisdiction of the Court, as above

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[1] *Bosville* v. *Lord Macdonald*, 1910 S.C. 597. [2] See *Morley* v. *Jackson*, 1888, 16 R. 78.

[3] *Standard Property Investment Co., Ltd.* v. *Dunblane Hydropathic Co., Ltd.*, 1884, 12 R. 328.

[4] *Haldane* v. *Girvan & Portpatrick Rly. Co.*, 1881, 8 R. 669.

[5] *Joel* v. *Gill*, 1859, 21 D. 929, esp. per Lord Justice-Clerk Inglis; *Goetze* v. *Aders, Preyer & Co.*, 1874, 2 R. 150; *Croil*, 1863, 1 M. 509; *Thompson* v. *Whitehead*, 1862, 24 D. 331.

explained, but the Court can award sequestration only if the debtor be notour bankrupt, and if he has resided, or had a dwelling-house or place of business, in Scotland within a year before the date of the presentation of the petition; and in the case of a firm, if it be notour bankrupt, and if within such time it has carried on business in Scotland, or if any partner have so resided or had a dwelling-house, or if the company have had a place of business, in Scotland. Sequestration may be awarded of the estate of a deceased debtor who at the date of his death was subject to the jurisdiction, at the instance of a mandatory or of creditors duly qualified.[1]

1199. Sequestration being a universal transference of the debtor's property, there cannot be two sequestrations; and, accordingly, if sequestration or its equivalent has been awarded by a foreign Court of competent jurisdiction, sequestration in this country will be refused.[2] The principle of the unity of bankruptcy, or, in other words, of the universality of the transference of the debtor's estate, is not recognised to this full extent in some countries. The contrary view, in favour of separate bankruptcies in the different countries in which the debtor had estate, has sometimes found favour.[3] But, so far as the unity of bankruptcy is recognised, the principles of international law applicable in all questions of jurisdiction in bankruptcy were summed up by Lord President Inglis in these four propositions:[4] (1) When the Court of the domicile has vested the moveable estate for distribution, no part of it can be touched or affected except through these proceedings, and by the order of that Court. Its jurisdiction is exclusive. (2) Where the bankrupt is a trading company with more than one domicile, the process may be instituted in the Court of either domicile, but that Court in which proceedings are first instituted has exclusive jurisdiction. (3) These principles do not apply to real estate situated beyond the country of the domicile. But in questions between different parts of His Majesty's dominions, this is regulated by statute.[5] (4) The trustee or assignee in the proceedings is, in his character as such, subject only to the jurisdiction of the Court to which he owes his title, and creditors claiming to participate in the distribution must resort to that Court to make good their claims.[6] The word "domicile" in this connection must mean residence or trading domicile, since the recognition of the plurality of domiciles excludes the construction of that term in the sense of "domicile of succession." But while the Court will decline to award sequestration where the existence of a proper process in a foreign

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[1] Bankruptcy (Scotland) Act, 1913, s. 11.

[2] *Goetze* v. *Aders, Preyer & Co.*, 1874, 2 R. 150.

[3] Westlake, Private International Law, 6th ed., p. 157.

[4] *Phosphate Sewage Co.* v. *Molleson*, 1878, 5 R. 1125; 6 R. (H.L.) 113.

[5] 19 & 20 Vict. c. 79, s. 102.

[6] See also *Strother* v. *Read*, 1803, Mor. "*Forum Competens*," App. No. 4; *Selkrig* v. *Davies*, 1814, 2 Dow 230; *Maitland* v. *Hoffman*, 1808, Mor. "Bankrupt." App. No. 26; *Royal Bank* v. *Scott, Smith, Stein & Co.'s Assignees*, 20th January 1813, F.C.; *Roy* v. *Campbell*, 1850, 12 D. 1028.

country is brought under their notice, it does not follow that an award of sequestration in terms of the statute is null because of the existence of a prior process before a competent foreign tribunal.[1]

Section 7.—Jurisdiction in the Winding up of Companies.

1200. The Court of Session has jurisdiction in the winding up of all companies registered in Scotland.[2] In the case of an unregistered company, which means any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under the Companies Acts, the Court of Session has jurisdiction if the company have in Scotland its principal place of business, or one of its principal places of business.[3] It has also jurisdiction in the case of a company incorporated in a foreign country and having its principal place of business there, but which has an office and assets in Scotland; and the fact that there is a foreign liquidation pending does not affect the jurisdiction of the Court to make the order, though this will generally be made ancillary to the liquidation in the country of the domicile.[4] But there is no jurisdiction where the company has no office or branch, but only carries on business by means of agents.[5]

Section 8.—Jurisdiction in Succession and Trusts.

1201. Jurisdiction in actions brought against executors or trustees with reference to the succession of deceased persons, while it may be sustained upon the same grounds as in ordinary petitory actions, depends in certain circumstances upon a wider foundation. Further, the Court, although possessing jurisdiction, exercises a discretion in determining whether it will entertain the case upon considerations of convenience.

1202. Jurisdiction to appoint and to confirm executors in Scotland arises from the presence in Scotland of estate of the deceased. This jurisdiction is vested by statute in the Sheriff Court,[6] subject to appeal to the Court of Session. Apart from these statutory provisions, there are certain principles recognised in international practice with reference to the appointment of executors or administrators. The basis of jurisdiction is the presence of property of the deceased within the territory. If, therefore, there be such property in more than one country, it is necessary to have a separate executry administration in each country; and the Court of each has an exclusive jurisdiction to

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[1] *Gibson* v. *Munro*, 1894, 21 R. 840, per Lord Young at p. 847.

[2] Companies (Consolidation) Act, 1908, s. 135. [3] Sec. 268.

[4] *Marshall*, 1895, 22 R. 697, under s. 199 of 1862 Act, which is re-enacted in s. 268 of 1908 Act.

[5] *In re Lloyd Générale Italiano*, 1885, 29 Ch. D. 219; but see *In re Commercial Bank of India*, 1868, L.R. 6 Eq. 517.

[6] Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56); Sheriff Courts Act, 1876 (39 & 40 Vict. c. 70), ss. 35–45.

authorise the administration of the property within its own territory.[1] Yet an important principle of comity controls the exercise of this jurisdiction. The Court of the deceased's domicile appoints the "principal executor"; and, in applications for "ancillary" administration in other countries, the principal executor is recognised as having a prior claim. Also, it is within the proper jurisdiction of the Court of the domicile to determine the validity and scope of a testamentary appointment of executors; and if the jurisdiction of some other Court be prorogated for that purpose, such Court should apply the law of the domicile.[2]

1203. The jurisdiction over executors and trustees may be either official or personal. Thus, an executor is always liable to account to the Court which appointed him. Also, if the testamentary trust be that of a domiciled Scotsman, and is to be administered in Scotland, those administering it will be subject to the Scottish Courts in all matters relating to its administration, regardless of the residence or local connections of the individuals who administer it.[3] "The obligation of trustees to account is one and indivisible, and is in general to be enforced by an appeal to the Courts of the country in which that obligation is to be fulfilled, and where the trust is to be executed."[4] Lord Watson has said, "In my opinion, the trust created by the *mortis causa* disposition and settlement is a Scotch trust, and *prima facie* his trustees are amenable in all questions touching the administration of the trust estate to the jurisdiction of the Courts of Scotland."[5] But, while such liabilities *ex officio* may bind trustees and executors, they are subject to be sued in relation to matters connected with their administration in the Courts to which they are personally subject by virtue of residence or other ground of personal jurisdiction. So, if a trustee or executor be subject to the jurisdiction of any Court in personal actions, that Court will have jurisdiction over him also in his capacity as trustee or executor in matters relating to the estate in his charge.[6] In Scotland arrestment of moveables would seem to be no less a good ground of jurisdiction against such a trustee than the universal ground of his residence.[7]

1204. It is clear that this multiplicity of possible grounds of jurisdiction against the personal representatives of a deceased person is liable to lead to considerable conflict of jurisdictions; and so it has proved in practice. Accordingly, in this department of the law, certain rules of comity have been laid down by high authority to regulate the exercise of such jurisdiction. After the long series of litiga-

[1] *Preston* v. *Melville*, 1841, 2 Rob. App. 88; 8 Cl. & F. 1.

[2] *Enohin* v. *Wylie*, 1862, 10 H.L.C. 1.

[3] *Kennedy* v. *Kennedy*, 1884, 12 R. 275, per Lord M'Laren; *Orr-Ewing's Trs.* v. *Orr-Ewing*, 1885, 13 R. (H.L.) 1, per Lord Watson at p. 23.

[4] Per Lord M'Laren in *Kennedy, supra.* [5] In *Orr-Ewing, supra*, at p. 23.

[6] *Preston* v. *Melville, supra;* and cases discussed by Lords Selborne and Watson in *Orr-Ewing, supra.*

[7] *M'Morine* v. *Cowie*, 1845, 7 D. 270.

tions which arose out of the administration of the Orr-Ewing estate, with a sharp conflict of jurisdiction between the Scottish and the English Courts, rules were laid down by Lord Watson in the House of Lords for regulating the exercise of such jurisdiction in cases where conflict was liable to arise. These rules were based upon the guiding principle that, where there are more than one Court having an undoubted jurisdiction over the same trust, each Court ought in exercising or declining jurisdiction to have regard to the consideration of the greater convenience, and should refrain from exercising its jurisdiction where there was a more convenient *forum* for determining the questions at issue or enforcing the rights of parties. The rules enunciated by Lord Watson draw a sharp distinction between "claim of debt at the instance of Scotch creditors," in which the Scots Court should exercise its jurisdiction over the trust without too much regard to the Court of the domicile of the trust, and (on the other hand) "claims by persons beneficially interested in the estate, which involve questions as to the due execution of their office by the trustees, or as to the rights and interests of other beneficiaries." In actions of the latter type the appropriate *forum* is that of the domicile of the trust, and other Courts should give way to its paramount rights.

1205. The Scottish Courts, however, may have to entertain an action against trustees under a foreign trust if the trustees are not amenable to the jurisdiction of the Court of the domicile, or if they are evading an accounting in that appropriate *forum*. Also, it may happen that the Scottish Courts may entertain such an action by way of aiding or supplementing the powers of the foreign Court. It is in conformity with this last rule that the Scottish Courts grant the necessary powers to trustees in a foreign trust to sell, or otherwise deal with Scottish heritage belonging to the trust, accepting the decision of the Court of the trust domicile that such dealing is for the benefit of the trust.[1] The rules thus elaborated by Lord Watson were drawn from a series of older Scots authorities, and have been the guiding rules in this branch of jurisdiction ever since.[2]

Section 9.—Reconvention.

1206. Where a foreigner brings an action in the Scots Courts, he is, upon considerations of equity, barred from pleading want of jurisdiction in an action brought against him by the defender, which is necessary for the complete determination of the rights of parties which are in dispute. In these circumstances the foreigner is said to be subject to the jurisdiction *ex reconventione*. The original action at the instance of the foreigner is known as the *actio conventionis*; the counteraction against him is the *actio reconventionis*. The doctrine of reconvention as it existed in the law of Rome, and has been received and

[1] *Pender's Trs.*, 1907 S.C. 207.

[2] See Lord Watson in *Orr-Ewing's Trs.* v. *Orr-Ewing*, 1885 13 R. (H.L.) 1, at pp. 26 to 30.

applied in Scotland, is elaborately discussed by Lord Justice-Clerk Inglis in *Thompson* v. *Whitehead*.[1] The result is thus stated: "Reconvention . . . is a rule devised entirely for the protection of a defender and for the speedy determination of counter-claims—that the claims must either arise *in eodem negotio* or be *ejusdem generis*—and that the rule will apply only where the two claims, the *conventio* and the *reconventio*, may be tried simultaneously, and terminated either by a single sentence or by two sentences contemporaneous or nearly contemporaneous."

1207. The rule of reconvention, as applied in the Courts of Scotland, may be summarised thus: When a foreigner brings an action here, the defender may raise, and the Court will have jurisdiction to entertain, a counter-action against him provided (1) that the original action is still depending, that is, has not been finally disposed of on the merits, and (2) that the two actions either arise *ex eodem negotio* or are *ejusdem generis*. The first question therefore to be considered relates to the limit of time within which the *actio reconventionis* must be raised. The theory stated above in the words of Lord Justice-Clerk Inglis, that the two cases should be capable of disposal in one judgment, or in two contemporaneous judgments, has fixed the rule that the *actio reconventionis* is timeously raised provided that the original action has not been disposed of on the merits, but that it will be too late if the merits have been so disposed of, notwithstanding that (*a*) expenses have not been decerned for, or (*b*) that the time for appeal to the House of Lords has not expired.[2]

1208. The next question relates to the necessary connection between the two actions. This involves something more than the identity of parties. They must arise *ex eodem negotio, i.e.* out of the same subject-matter, or if they arise *ex diversis causis* they must be *ejusdem generis*, at least in the sense that they are claims which can fairly be set off against one another. The first suggested relation may be illustrated by the case of counter-actions to determine the liability for the same collision at sea,[3] or by counter-actions between a trustee in bankruptcy and a creditor on questions relating to the winding up of an estate.[4] Such actions arise *ex eodem negotio*; and if they fall within that category they need not be of the same type as regards the remedy sought. Thus, when a foreign company sued a liquidator for payment, he was entitled to retaliate with an action of interdict.[5]

1209. Failing this identity of subject-matter, there must exist, to satisfy the requirements of reconvention, the other relation between the actions, which has been referred to in technical language by saying that they must be *ejusdem generis*. It is not easy to explain from the decided cases the precise significance of this requirement. It seems to

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[1] 1862, 24 D. 331.
[2] *Hurst, Nelson & Co.* v. *Spenser, Whately & Co.*, 1912 S.C. 1041.
[3] *Morison & Milne* v. *Bartolomeo & Massa*, 1866, 5 M. 130.
[4] *Ord* v. *Barton*, 1847, 9 D. 541.
[5] *California Redwood Co.* v. *Merchant Banking Co. of London*, 1886, 13 R. 1202.

mean that the counter-action is of such a character that, according to our practice, the claim made in it could be "set off" against the claim in the first action. In *Thompson* v. *Whitehead*,[1] a foreigner had sued for enforcement of an English judgment, and the defender retorted with an action of damages for assault, claiming that the foreigner was subject to the jurisdiction *ex reconventione*. The Court refused to exercise a jurisdiction by reconvention in these circumstances; and the ground of the decision was that, if the two litigants had both been Scotsmen, the claim of damages could not have been "set off" as a counter-claim against a judgment debt. The principle of reconvention was there said to be the protection of the citizen against being put at a disadvantage through being obliged to meet the claim of the foreigner, without being allowed to set up against that claim a counter-claim which he could have put forward if his adversary had been a Scotsman and subject to the jurisdiction. Reconvention was described in that case as the "unrestrained application of the principle of equity which is the foundation of the law of compensation—the principle, namely, which teaches that it is iniquitous and oppressive to demand payment of a debt, however just, while you withhold from your debtor his property or funds, by the use of which he might be enabled to pay you." From these principles it follows that, if there were two liquid, or properly constituted, debts (such, for example, as a bill or bond, or a judgment debt) the foreigner could not sue for one without being liable to an action to have the other set off against it. On the other hand, if both are illiquid debts, *e.g.* claims on open account, "there seems no good reason in equity why, while the foreign pursuer is engaged in constituting his debt by action against the native defender, the latter should not simultaneously, in the same Court, constitute his debt against the foreign pursuer." Also, by application of the principle of compensation, it would seem to follow that, if the defender in the *actio conventionis* is sued on some illiquid claim, he can appeal to the principle of reconvention to bring a counter-action to set off a liquid claim against his adversary. It is more doubtful whether claims would be held to be *ejusdem generis* if both were based on contract, both on delict, or both were maritime causes, or belonging to some other well-recognised type of action.

1210. Reconvention will not extend the jurisdiction of the Court *ratione materiae*. Thus, a judge will not be given a jurisdiction over a type of action for which he is not otherwise competent, such as one dealing with rights in foreign heritage.[2] The jurisdiction, however, conferred by reconvention is not limited in amount to the sum which is in dispute in the *actio conventionis*.[3] Finally, while it is good practice to set forth in the *actio reconventionis* the ground of jurisdiction on which it is based, it is not an essential of relevancy that this should be done.[3]

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[1] 1862, 24 D. 331.
[2] Lord Justice-Clerk Inglis in *Thompson* v. *Whitehead*, 24 D. at pp. 343 and 345.
[3] *Ord* v. *Barton*, 1847, 9 D. 541.

Section 10.—Prorogation.

1211. In marked contrast to the grounds of jurisdiction which have been considered, which depend in greater or less degree on the principle of effectiveness, stands jurisdiction arising from the submission of parties who would not otherwise be amenable. This principle of submission gives rise to what is known as jurisdiction by prorogation. It consists essentially in the waiver by the defender of his objection to the jurisdiction. "*Si se subiciant aliqui jurisdictioni et consentiant; inter consentientes cujusvis judicis, qui tribunali praeest vel aliam jurisdictionem habet, est jurisdictio.*" [1] The principal questions arising under this head are the limitations, if any, which the law puts upon the prorogation of jurisdiction, and the methods whereby a party may indicate his acquiescence or "submission."

1212. A party may prorogate the jurisdiction of the Court in which an action is brought against him for the purpose of that particular action only. Probably an agreement embodied in a contract to submit all questions arising thereunder to the Courts of a particular country, as is sometime done in an insurance policy, is a good and binding submission. But it has been suggested that there must be a limit to the recognition of this voluntary submission, or the result would be to enable the parties to withdraw themselves from the judicial power of the proper *forum* of the defender.[2] Moreover, prorogation will not extend the scope of a judge's jurisdiction *ratione materiae*, or give jurisdiction in an action which is in its nature incompetent in the particular tribunal. It is not every judge whose jurisdiction can be prorogated for every kind of action. The disability which may be overcome by prorogation is only the lack of the personal subjection of the defender to the judge. Where it is the nature of the action, and not the situation of the parties, which makes the Court incompetent, there is no room for the principle of submission.[3]

1213. No prorogation is permissible to a judge who is no longer in office, or who is acting outwith his territory.[4] As to the personal disqualifications of a judge, the distinction must be drawn between those which are statutory and those which arise under the common law. Thus, the disqualifications which depend on the relationship of the judge to the parties are statutory,[5] and will not be evaded by any consent of the parties to the suit. On the other hand, the disqualification arising from the interest of the judge in the subject-matter of the action arises at common law, and may be obviated by consent.[6]

1214. The type of action must be intrinsically appropriate to the Court in which it is brought. The Court of Chancery (as Lord

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[1] Dig. v. i. 1. [2] See Bar's Private International Law (Gillespie's tr.), p. 923.
[3] *Forrest* v. *Harvey*, 1845, 4 Bell's App. 197; Ersk. i. 2, 30.
[4] Ersk. i. 2, 29. [5] Acts 1594, c. 216; 1681, c. 13.
[6] *Smith* v. *Liverpool and London and Globe Insurance Co.*, 1887, 14 R. 931; *Sellar* v. *Highland Rly. Co.*, 1919 S.C. (H.L.) 19.

Brougham once said [1]) cannot by prorogation of parties be made a competent Court of Probate for granting probate of a will. And it is probably only an application of the same rule, though an important one, that in actions in which an exclusive *forum* is recognised there can be no prorogation of the jurisdiction of any other Court. This rule finds its most familiar illustration in the case of actions of divorce,[2] but probably the rule is quite general.[3]

1215. Prorogation may be either express or tacit. The defender may in his pleadings or by minute in the process accept the jurisdiction of the Court, though these methods are now practically obsolete. For it is now a well-established rule that, if he lodges defences without therein challenging by a definite plea the jurisdiction of the Court, he is held thereby to have prorogated it. This plea may, however, be timeously stated during the adjustment of the record.[4] There may be a binding agreement to prorogate contained in some document extraneous to the pleadings which will prevent a party challenging the jurisdiction when the action is brought. Thus, when shipowners, to avoid the arrest of their ship, granted a bail-bond in which they consented to the salvors suing them either in England or Scotland, they were held to be barred from pleading that the English Courts had no jurisdiction.[5]

Section 11.—Criminal Jurisdiction.

Subsection (1).—*General Rule.*

1216. At common law the jurisdiction of the criminal Courts of Scotland depends primarily on the *locus delicti*. "Every person, British subject or foreigner, charged with crime committed in Scotland . . . is amenable to the jurisdiction of the Scottish Courts." [6] As a person will not, as a rule, be tried in his absence, it is necessary in the ordinary case that he be in Scotland and before the Court.[7] Exceptions to both these rules will be mentioned subsequently.

1217. The High Court of Justiciary has jurisdiction over the whole territory of Scotland, and also over the territorial waters within the "three-mile limit." The criminal jurisdiction over offences committed on board ships within territorial waters would seem to be independent of the nationality of the accused and of the ship.[8] In England there was no criminal jurisdiction over foreigners within territorial waters [9] until the passing of the Territorial Waters Jurisdiction Act, 1878.[1] That Act provided that an offence committed by a person, whether a subject of Her Majesty or not, "on the open sea within the territorial

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[1] In *Forrest* v. *Harvey, supra,* at p. 207.
[2] Fraser, Husband and Wife, ii. 1294.
[3] Mackay, Manual of Practice, 63.
[4] *Jeffs* v. *Fraser-Johnston Engineering and Ship-Repairing Co.*, 1920 S.C. 222.
[5] *Elderslie S.S. Co., Ltd.* v. *Burrell & Son*, 1895, 22 R. 389.
[6] Macdonald, Criminal Law, p. 276.
[7] Hume on Crimes, ii. 47.
[8] Macdonald, Criminal Law, p. 279.
[9] *Reg.* v. *Keyn*, 1876, L.R. 2 Ex. Div. 63.
[10] 41 & 42 Vict. c. 73.

waters of Her Majesty's dominions," should be an offence "within the jurisdiction of the admiral," although committed on board, or by means of, a foreign ship. "The jurisdiction of the admiral" was defined to include the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions, as used in any Act of Parliament.

1218. As a crime may be made up of acts and occurrences happening in different places, it may, in certain cases, be difficult to determine whether the crime was committed within the jurisdiction or not, and crimes are so diverse in their nature and incidents that no general rule can well be laid down.[1] It is decided that there is jurisdiction in Scotland where a forgery, fabricated in England, is uttered in Scotland;[2] where it is uttered in Scotland by being posted in a letter addressed to England;[3] where goods are obtained in England by a fraudulent letter despatched from Scotland;[4] where money is obtained by an Englishman by means of a fraudulent advertisement in Scotland;[5] where a Scottish bankrupt uplifts money in England to defraud his creditors.[6] Thieves and resetters found in possession of stolen property may be tried where they are apprehended, the crime being continuous. This is both at common law and by statute,[7] and applies only to the theft or reset which is continued by the possession, not to any peculiarity in the manner of taking, as by housebreaking or the like.[8]

Subsection (2).—*Exceptions.*

1219. Exceptions to the rule of jurisdiction based on the *locus delicti* and the presence of the accused occur both under the common law and by statute.

(i) *Common-law Exceptions.*

1220. (1) When a Scotsman commits a crime in Scotland the Courts have jurisdiction to pronounce sentence of outlawry and of single and liferent escheat, even in the absence of the accused.[9] This jurisdiction does not exist in the case of a foreigner, since he is under no obligation to remain and to answer in the Scots Courts.[10] (2) In the crime of treason the jurisdiction is based, not on *locus delicti*, but on nationality or allegiance. The Scots Courts, therefore, as representing the British Sovereign, have jurisdiction to try cases of treason charged against British subjects wherever the crime is committed.[11] (3) Piracy on the

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[1] See discussion of this question in Stephen, History of Criminal Law, ii. 9 *et seq.*; *Reg.* v. *Keyn*, 1876, L.R. 2 Ex. Div. 63, per Denman J. at p. 103, per Coleridge C.J. at p. 158, per Cockburn C.J. at pp. 232–235.

[2] Hume, ii. 53, 54, and cases there; *Humphreys*, 1839, Bell's Notes 148.

[3] *Jeffreys*, 1842, 1 Broun 337, Bell's Notes 149.

[4] *Witherington*, 1881, 4 Coup. 475; 8 R. (J.) 41; *Bradbury*, 1872, 2 Coup. 311.

[5] *Allan*, 1873, 2 Coup. 402.

[6] *M'Kay*, 1866, 5 Irv. 329.

[7] Hume, ii. 54, and cases cited; Macdonald, Criminal Law, p. 278; Acts 13 Geo. III. c. 31, ss. 4 and 5; 44 Geo. III. c. 92, ss. 7, 8; 24 & 25 Vict. c. 96, s. 114.

[8] Hume, ii. 55; Alison, ii. 78, 79.

[9] Hume, ii. 50; and *Cresswell*, there reported.

[10] Hume, ii. 57.

[11] *Ibid.*, 50, and cases of *Kirkpatrick*, 1665, and *Macdonald*, 1747, there reported.

high seas is justiciable by the Courts of Scotland in whatever part of the world committed and whatever the nationality of the accused and of the ship.[1] (4) Crimes committed on the high seas on British ships, or on British ships in foreign ports, if the accused be a British subject, are subject to the Scots criminal Courts. This jurisdiction is defined, but apparently not extended, by statute.[2]

(ii) *Statutory Exceptions.*

1221. (1) The Coining Act gives to the Scots Courts a jurisdiction to try coining offences committed at sea on ships registered at Scottish ports. Also, a Court which has tried a first offence under the Coining Act has jurisdiction to try a second offence.[3] (2) It is provided by the Foreign Enlistment Act, 1870,[4] that any offence against that Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be. (3) Statutory provisions affect the jurisdiction to try offences under the Post Office Acts.[5] (4) Fishery statutes. It was held in *Mortensen* v. *Peters* [6] that a foreigner who had been convicted in the Sheriff Court at Dornoch of trawling within the Moray Firth, but outwith the three-mile limit, was subject to the jurisdiction of that Court in virtue of the British fishery statutes. The Legislature was held to have assumed a right to regulate fishing in the Firth, even by foreigners, and the Court could not restrict the meaning of the enactments.

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[1] Hume, i. 480; Macdonald, Criminal Law, p. 279.
[2] Merchant Shipping Act, 1894, s. 686; Macdonald, Criminal Law, p. 279.
[3] 24 & 25 Vict. c. 99, ss. 28 and 36.
[4] 33 & 34 Vict. c. 90, s. 16.
[5] See CRIME, *sub voce* Post Office Offences, Vol. V, p. 104 *ante*.
[6] 1906, 8 F. (J.) 93.

JURISPRUDENCE.

See LAW.

JURY TRIAL.

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Section 1.—Origin of Jury Trial and Constitution of Jury.

1222. Trial by jury has for a long time been part of the judicial procedure of Scotland. It was certainly in existence in the fourteenth

century, as is shewn by a statute of the reign of James III.[1] relating to jurors who swore falsely, but the approximate date of its introduction into Scotland can probably not be determined. It was originally used both for the trial of civil and of criminal causes, but by the time of Sir George Mackenzie it had fallen into complete desuetude as a tribunal for the trial of civil causes.[2] When it was in use as a civil tribunal, the number of the jury was, as at present, twelve. Long custom has now fixed the number of the jury in a criminal cause at fifteen, but it might at one time be more or less than fifteen provided the number was unequal.[3]

1223. Trial by jury in civil causes was reintroduced into the judicial procedure of Scotland in 1815.[4] The statute passed then was only to operate for five years, but four years later its scope was extended and the institution of jury trial was made permanent.[5] By the Judicature Act, 1825,[6] the powers of the Jury Court were further extended. Under all these statutes trials by jury were conducted by a Court separate and distinct from the Court of Session, called the Jury Court. This Court consisted of three judges (afterwards increased to five), called the "Lords Commissioners of the Jury Court in civil causes," and possessed a separate and suitable establishment of clerks and other officers. As originally established, however, it had no independent jurisdiction, but was regarded as a judicial commission for the ascertainment of certain facts deemed pertinent "to a cause by the judges of the Court by whom the issues were remitted to the Jury Court to be tried." The semi-independence of the Jury Court was found to be inconvenient, and in 1830 the Court was abolished, and it was enacted that all trials by jury in civil cases should take place in the Court of Session.[7]

1224. The number of a jury in a civil cause in the Court of Session is twelve.[8]

Section 2.—Qualification of Jurors.

Subsection (1).—*Common Jurors.*

1225. The qualification of common jurors is regulated by 6 Geo. IV. c. 22, s. 1. Everyone of either sex [9] is qualified who at the time of the trial on which he may be required to serve has and is seized "in his own right, or in the right of his wife, of lands or tenements, of an estate of inheritance, or for his or her life, within the county or shire, city or place from whence the jury is to come, of the yearly value of five pounds at the least, or shall be then worth in goods, chattels, and personal estate the sum of two hundred pounds sterling at least."

Subsection (2).—*Special Jurors.*

1226. Every man or woman between the same ages who (*a*) pays rates or taxes upon £100 of valued rent, or (*b*) pays assessed taxes to

[1] Jas. III. Parl. VI. c. 47.
[2] Works, vol. ii. p. 243.
[3] Mackenzie's Works, *loc. cit.*
[4] 55 Geo. III. c. 42.
[5] 59 Geo. III. c. 35.
[6] 6 Geo. IV. c. 120.
[7] 11 Geo. IV. and 1 Will. IV. c. 69.
[8] 31 & 32 Vict. c. 100, s. 44.
[9] 9 & 10 Geo. V. c. 71; and 10 & 11 Geo. V. c. 53.

the Crown on a house of the rent of £30 sterling a year, (*c*) is proprietor of heritable property of £100 sterling of real rent per annum, or (*d*) is possessed of money, goods, and personal property to the amount of £1000 at least, is qualified to be a special juror.[1]

Subsection (3).—*Persons Exempt from Service.*

1227. Certain persons are exempted from serving: All peers, judges of the Supreme Courts, Sheriffs of counties, magistrates of royal burghs, ministers of the Established Church and other ministers of religion who shall have duly taken and subscribed the oaths and declarations required by law and whose place of meeting shall be duly registered, and parochial schoolmasters, advocates practising as members of the Faculty of Advocates, writers to the Signet practising as such, solicitors practising before the Supreme Courts, procurators practising before any inferior Court, having severally taken out their annual certificates, clerks or other officers of any Court of Justice actually exercising the duties of their office, jailers or keepers of houses of correction, professors of any university, physicians and surgeons, duly qualified as such and actually practising, officers in the Navy or Army on full pay, officers of Customs and Excise, messengers-at-arms and other officers of the law, also lighthouse-keepers and their assistants,[2] registered dentists,[3] soldiers, pensioners, and volunteers acting with the regular Army and subject to military law,[4] commissioners and other officers of the Inland Revenue,[5] officers of the Post Office,[6] and officers and men of the Territorial Forces.[7]

Section 3.—Citation of Jurors.

1128. It is the duty of the Sheriff of each county to make up a list of persons within his county qualified and liable to serve as jurors.[8] In practice this jury list is obtained in the following manner: A schedule is issued to every householder setting forth the qualifications of a common and a special juror respectively, and requiring him to fill up in writing the Christian name and surname, with the designations, of every man or woman permanently resident in the dwelling-house of the householder between the ages of 21 and 60 who is qualified to serve as a special or a common juror. From the list so obtained the General Jury Book is compiled. It contains the Roll of Special Jurors and the Roll of Common Jurors, the rolls of men and women jurors being kept separate. It is from this General Jury Book that the various lists of assize for all criminal and civil jury trials in Scotland are made up. The names are taken in the order in which they appear in the rolls, one-third of the number required being taken from the poll of special jurors.[9]

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[1] 55 Geo. III. c. 42, s. 25; 7 Geo. IV. c. 8, s. 1.
[2] 32 & 33 Vict. c. 36, s. 1.
[3] 41 & 42 Vict. c. 33, s. 30.
[4] 44 & 45 Vict. c. 58, ss. 147, 175, 176, 178.
[5] 53 & 54 Vict. c. 21, s. 8.
[6] 8 Edw. VII. c. 48, s. 43.
[7] 8 Edw. VII. c. 9, s. 23 (4).
[8] 6 Geo. IV. c. 22, ss. 3, 4; 7 Geo. IV. c. 8.
[9] 50 & 51 Vict. c. 35, s. 38; 30 & 31 Vict. c. 100, s. 44.

1229. When a case is set down for trial before the High Court of Justiciary a precept is issued by the Clerk of Justiciary to the Sheriff of the county in which the trial is to take place requiring him to return a list of assize. The minimum number to be returned in any list, whether for trials before the High Court or Sheriff Courts, is thirty.[1] The number of jurors to be cited in criminal cases is now regulated by Act of Adjournal.[2] The present practice of the High Court of Justiciary is to require a list of sixty jurors for a sitting in Edinburgh. There are almost invariably more than three cases for trial when the High Court sits in Glasgow, which it does as a rule every two months. Two Courts are usually trying cases at the same time, and the practice is to summon an assize of two hundred persons for service indifferently in either Court. A husband and wife cannot be returned in any case on the same list of assize.[3] When a juror fails to answer his citation in a criminal cause, and no sufficient excuse is offered, he is fined one hundred merks Scots (£5, 11s. 1⅓d).[4]

1230. For a civil jury trial in the Court of Session not less than thirty-six and not more than fifty jurors must be cited,[5] and one-third of the number must be special jurors. In practice thirty-six are cited, thirty-one being drawn from the county of Midlothian, including the city of Edinburgh, two from the county of Haddington, and three from the county of Linlithgow. The penalty for failure to answer to a citation is not less than £2 and not more than £5.[6]

1231. In inquiries by Sheriff and jury under the Fatal Accidents Inquiry (Scotland) Act, 1895,[7] the jury balloted to serve consists of five common and two special jurors. The Act directs the sheriff-clerk to cite ten common and five special jurors from the Sheriff Court Book in the manner provided by statute for citation of jurors in civil causes.[8]

Section 4.—Composition of Jury.

Subsection (1).—*Ordinary Jury.*

1232. Except where an order is made for the trial of an action by a male or female jury the list of jurors must be composed as nearly as possible in equal numbers of men and women jurors, and the proportion of men and women respectively included in such list as special jurors must as nearly as possible be equal.[9]

1233. When a woman is summoned to serve as a juror, her citation contains a notice intimating that she may apply for exemption from service on account of pregnancy or other feminine condition or ailment unfitting her for the time being from serving on a jury.[10] Such application must be made to the clerk of Court not later than the third day

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[1] 50 & 51 Vict. c. 35, s. 38.
[2] 2nd January 1921.
[3] A.S., 2nd February 1921, 1 (vii.).
[4] Act 1587, c. 54, s. 10; Act 1593, c. 13.
[5] 55 Geo. III. c. 42, s. 20.
[6] 55 Geo. III. c. 42, s. 22.
[7] 58 & 59 Vict. c. 36.
[8] 58 & 59 Vict. c. 36, s. 4 (5); 6 Edw. VII. c. 35, s. 4.
[9] A.S., 5th February 1921, s. 3.
[10] *Ibid.*, s. 5 (*c*).

before the day appointed for the trial, unless on special cause shewn, and must be supported by adequate evidence that she is or will be unfit for service.[1] The clerk of Court disposes of the application, and before doing so he may consult any judge competent to try the cause.[2]

1234. The jurors are chosen in open Court by ballot from the list of persons summoned, and a jury consists in a criminal case of ten common and five special, and in a civil case of eight common and four special jurors.[3] If any of the persons summoned fails to attend the Court he may be fined unless his excuses are admitted by the judge.[4] The method of balloting is discussed below.[5] The remuneration to jurors in civil cases is at the rate of ten shillings a day.[6] In criminal cases there is no remuneration.

Subsection (2).—*Special Jury.*

1235. Either of the parties to a civil cause which has been set apart for trial by jury may apply for a special jury.[7] Intimation of a motion for that purpose must be given to the other party within four days of the interlocutor fixing a diet or appointing the trial to proceed at the sittings, and such intimation must be made thirty-six hours before the motion is moved in Court. If a special jury is ordered the clerk of Court signs and issues a precept to the sheriff-clerk of the county or counties from which the special jury is to come, requiring him forthwith to return the names of thirty-six persons qualified to be special jurymen. As soon as the clerk of Court receives the return of the thirty-six names he gives forty-eight hours' notice to the parties to attend at the Register House for the purpose of reducing the jury to twenty. After the jury is thus reduced a precept is issued for summoning them to the trial, when twelve of them are selected by ballot.[8] The granting of a special jury is in the discretion of the Court.

Subsection (3).—*Jury of Men or of Women only.*

1236. Although men and women are now equally eligible for service on juries, any judge before whom a case is or may be heard may, in his discretion on an application made by or on behalf of the parties (including in criminal cases the prosecution and the accused) or any of them, or at his own instance, make an order that the jury shall be composed of men only or of women only as the case may require, or may, in an application made by a woman to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the issues to be tried, grant such exemption.[9] Any application for a male or female jury must be made at the time when a date is appointed for the trial, or, if a new trial is ordered, at the time when

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[1] A.S., 5th February 1921, s. 5 (*a*). [2] *Ibid.*, s. 5 (*b*). [3] 31 & 32 Vict. c. 100, s. 44.
[4] 55 Geo. III. c. 42, s. 22. [5] See para. 1291, *infra*.
[6] 31 & 32 Vict. c. 100, s. 49. [7] 55 Geo. III. c. 42, s. 24; 13 & 14 Vict. c. 36, s. 42.
[8] 55 Geo. III. c. 42, ss. 26 and 27; C.A.S., F, i. 7, 8. [9] 9 & 10 Geo. V. c. 71, s. 1 (*b*).

a date is appointed for a new trial.[1] When an order is made for the trial of the action by a male or female jury, the precept subsequently issued for the preparation of a list of jurors states that the list is to be composed of men only, or of women only, as the case may be.[2]

Section 5.—Trial by Jury in Criminal Cases.

1237. This subject is fully dealt with elsewhere.[3] What follows of the present article is concerned only with jury trial in civil cases except where otherwise specifically stated.

Section 6.—What Civil Cases are Tried by Jury.

1238. By the Judicature Act [4] the following list of causes to be tried by jury is enumerated: "All actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation; all actions on account of any injury to moveables or to land, when in this last case the title is not in question; all actions for damages on account of breach of promise of marriage, or on account of seduction or adultery; all actions founded on delinquency or quasi-delinquency of any kind, where the conclusion shall be for damages only and expenses; all actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities, horses, money, clothes, jewels, and other articles, and, in general, all actions grounded on the principle of the Edict *Nautæ, Caupones, Stabularii*; all actions brought for nuisance; all actions of reduction on the head of furiosity and idiocy, or on facility and lesion, or on force and fear; all actions on policies of insurance for maritime or fire or life insurance; all actions on charter-parties and bills of lading; all actions for freight; all actions on contracts for the carriage of goods by land and water; and actions for the wages of masters and mariners of ships or vessels." By the Court of Session Act, 1850,[5] proof on commission was allowed in place of trial by jury in all cases above enumerated, except in actions for libel or nuisance, or such as are properly and in substance actions of damages. By the Evidence Act, 1866,[6] it was enacted that the Lord Ordinary, with consent of parties or on special cause shewn, might dispense with a jury in any cause in dependence before him.

1239. These latter Acts give considerable latitude to the discretion of the judge before whom the case is called, and the Inner House will not readily interfere with this discretion. Generally speaking, the cases sent for jury trial are all actions of damages for personal injury,[7] breach of promise of marriage, seduction,[8] defamation or nuisance, all

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[1] A.S., 5th February 1921, s. 1 (*a*).
[2] *Ibid.*, s. 2 (*a*).
[3] See Crime (Procedure), Vol. V. p. 232, *ante*.
[4] 6 Geo. IV. c. 120, s. 28.
[5] 13 & 14 Vict. c. 36, s. 49.
[6] 29 & 30 Vict. c. 112, s. 4.
[7] *Gibb* v. *Edinburgh and District Tramways Co.*, 1912 S.C. 580.
[8] *Trotter* v. *Happer*, 1888, 16 R. 141.

actions as to public rights of way,[1] and actions of reduction of deeds on the ground of incapacity, facility and circumvention [2] and essential error.[3] Actions of declarator of rights of way are not among the enumerated causes in the Judicature Act, and it was only after some difference of judicial opinion that it became the general rule to try such cases by jury. There are, however, exceptions to this rule. Where the questions at issue are complicated [4] or have formed the subject of discussion in the public press,[5] or where there are questions of delicacy as to the character and sufficiency of the evidence,[6] the appropriate mode of trial is by a judge without a jury. In actions of damages, also, the Court will dispense with a jury in exceptional cases, as for example when delicate questions of fact and law are involved.[7]

Section 7.—Procedure Prior to Trial.

Subsection (1).—*Record and Issues.*

1240. Up to the date of closing the record the procedure is the same as in ordinary Court of Session actions. After closing the record it is customary, where a jury trial is desired, for the pursuer to ask an order for issues. If this course is followed, and issues are ordered, parties may discuss the relevancy of the action on the adjustment of issues. It is, however, not uncommon for a case to be sent to the Procedure Roll for discussion on the relevancy. The most usual case in which this is done is where it is obvious on the face of the pleadings that a long and difficult discussion will ensue. It is competent for the Court to dispense with an issue and send the case for trial before a jury upon the record,[8] but this procedure is not common, and it has recently been disapproved of.[9] When it is followed the record is not placed before the jury.[10]

1241. After issues have been finally adjusted, a cause never falls asleep.[11] If, however, the pursuer or "the party appointed to stand as pursuer" does not proceed to trial within twelve months after issues have been finally approved, the Court proceeds as in cases in which parties are held as confessed, unless sufficient cause for delay is shewn to the satisfaction of the Court.[12]

Subsection (2).—*Adjustment of Issues.*

1242. Issue as a technical term in civil process means a question of fact submitted to a jury. When issues are ordered for the trial of

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[1] *Robertson* v. *Duke of Atholl*, 1905, 8 F. 150.
[2] *Clark* v. *Young*, 1885, 13 R. 313; *Ross* v. *Gosselin's Exrs.*, 1926 S.C. 325.
[3] *M'Caig* v. *Glasgow University Court*, 1904, 6 F. 918.
[4] *Macfie* v. *Stewart*, 1872, 10 M. 408.
[5] *Scottish Rights of Way Society* v. *Macpherson*, 1886, 14 R. 7; *Blair* v. *Macfie*, 1884, 11 R. 515.
[6] *Fraser Tytler's Trs.* v. *Milton*, 1890, 17 R. 670.
[7] *Fowler* v. *North British Rly. Co.*, 1914 S.C. 866.
[8] C.A.S., C, ii. 4 (*e*).
[9] *Miller* v. *London and North-Eastern Rly. Co.*, 1927 S.C. 765.
[10] *Brannan* v. *North British Rly. Co.*, 1884, 12 R. 61.
[11] C.A.S., F, iv. 5.
[12] *Ibid.*, 4.

any cause, their adjustment, *i.e.* the settlement of the questions of fact to be submitted to the jury, is fixed for a day not later than eight days from the date of the order, and the issues and counter-issues should be lodged two days before the date so fixed.[1] The Lord Ordinary, however, has a discretion to allow issues not timeously lodged to be adjusted.[2] The issues so lodged are subject to objection by the opposite party, and to alteration by the party lodging them, prior to the pronouncement of an interlocutor disposing of them.[3] If the Court sustains a motion for the disapproval of issues altogether, the action is dismissed, or the defences are repelled wholly or in part, as the case may be. If, however, issues either as lodged or amended are approved, they are appointed to be the issues for the trial of the cause. An interlocutor ordering issues is not one allowing proof, and cannot therefore be reclaimed against without leave.[4] An interlocutor approving of issues, if not reclaimed against within six days, is final. Amendment of the record and issues may, however, be made at any time for the purpose of raising the true question at issue between the parties.[5]

Subsection (3).—*Varying Issue—Reclaiming.*

1243. When issues have been adjusted in the Outer House and either party is dissatisfied with their terms, he may, unless he has previously moved for the fixing of a day for the trial,[6] within six days of the date of the Lord Ordinary's interlocutor, lodge a notice of motion [7] in the Inner House to vary their terms.[8] But if a party objects to an issue being allowed at all, or complains of an issue having been disallowed, he must raise the matter by way of a reclaiming note [9] and not by a motion to vary.[10] On the other hand, when the object is merely to vary, a reclaiming note is incompetent.[11] Upon a motion to vary it is incompetent to substitute one issue for another, and where this is desired a reclaiming note should be presented.[10] Amendment of an issue is a different matter. A motion to amend may be made at any time.[12]

Subsection (4).—*Counter-issue.*

1244. Except for the purpose of proving *veritas* in an action of damages for slander, the counter-issue has fallen into disuse. Con-

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[1] C.A.S., C, ii. 4 (*e*).
[2] *Wylie* v. *Wylie*, 1911 S.C. 1.
[3] *Mathieson* v. *Scottish Trade Protection Society*, 1895, 1 F. 234.
[4] *Kennedy* v. *Wise*, 1890, 17 R. 1036.
[5] 31 & 32 Vict. c. 100, s. 29; *M'Garvey* v. *Boyle*, 1893, 1 S.L.T. 291; *M'Keand* v. *Maxwell*, 1896, 3 S.L.T. 321; *Hughes* v. *Williamson*, 1906, 13 S.L.T. 678; but see *Arthur* v. *Lindsay*, 1895, 22 R. 417.
[6] *Craig* v. *Jex Blake*, 1871, 9 M. 715; *Croucher* v. *Inglis*, 1889, 16 R. 774.
[7] *Dingwall* v. *Fisher*, 1909 S.C. 745.
[8] 31 & 32 Vict. c. 100, s. 28; C.A.S., F, i. 2.
[9] *Mason* v. *Stewart*, 1877, 4 R. 513.
[10] *Burns* v. *Diamond*, 1896, 23 R. 507.
[11] *MacArthur* v. *Ballantyne*, 1871, 8 S.L.R. 499.
[12] *Kane* v. *Stephens & Sons*, 1900, 2 F. 739; *Hughes* v. *Edinburgh Town Council*, 1905, 13 S.L.T. 672; C.A.S., B, i. 7.

tributory negligence may always be proved without a counter-issue,[1] and privilege does not require one.[2] Any defence also arising out of the *res gestæ* of the case, which does not amount to *veritas*, may be set up without a counter-issue.[3] A counter-issue has been allowed where a claim of damages for personal injury was met by the defence that the pursuer had already accepted compensation under the Workmen's Compensation Act,[4] but in later cases this defence has been investigated by means of a preliminary proof.[5] A counter-issue has also been allowed in a case where the defenders pleaded exemption from liability by reason of the conditions printed on the passenger ticket issued to the pursuer,[6] but in the most recent case a jury trial was refused, and proof before a judge was ordered.[7] A defence of *compensatio injuriarum* is incompetent and cannot be made the subject of a counter-issue.[8] A counter-issue of *veritas* has been allowed although the defender on a former occasion had written a letter admitting that similar statements then made by her were false, and undertaking not to repeat them.[9]

1245. A counter-issue, however, must be taken if the defender seeks to justify the statement complained of,[10] or any material and separable part of it,[11] by pleading *veritas*, and he may plead *veritas* while denying that he used the words complained of.[12] The counter-issue must meet completely the issue for the pursuer,[13] but this requirement may be satisfied if the defender's issue negatives the essence of the pursuer's issue.[14] If the principal issue contains a specific charge, the counter-issue asks if this charge is true.[15] If a general charge is complained of, the counter-issue asks in general terms whether this charge is true. This issue, however, will not be allowed unless the defender's record contains a sufficient specification of facts to support the general charge.[16] A pursuer instead of taking a general issue founded upon specific charges may select certain of these charges as the subject of particular issues,

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[1] *Donald* v. *Clyde Navigation Trs.*, 1875, 2 R. 813.

[2] *Wright and Greig* v. *Outram & Co.*, 1889, 16 R. 1004.

[3] *Paul* v. *Jackson*, 1884, 11 R. 460; *Shaw* v. *Morgan*, 1888, 15 R. 865, at p. 871.

[4] *Campbell* v. *Caledonian Rly. Co.*, 1899, 1 F. 887.

[5] *Hunter* v. *Darngavil Coal Co.*, 1900, 3 F. 10; *Sinclair* v. *Lochgelly Coal Co.*, 1905, 13 S.L.T. 103; *Buchanan* v. *Alexander Cross & Sons*, 1911, 2 S.L.T. 33.

[6] *Grieve* v. *The Turbine Steamers, Ltd.*, 1903, 11 S.L.T. 379; *Caird* v. *Adam*, 1907, 15 S.L.T. 543.

[7] *Williamson* v. *North of Scotland Navigation Co.*, 1915 S.C. 295.

[8] *Bertram* v. *Pace*, 1885, 12 R. 798.

[9] *R.* v. *T.*, 1914 S.C. 193.

[10] *M'Neill* v. *Rorison*, 1847, 10 D. 15; *Torrance* v. *Weddell*, 1868, 7 M. 243; *Craig* v. *Jex Blake*, 1871, 9 M. 973; *Paul* v. *Jackson*, 1884, 11 R. 460.

[11] *M'Neill* v. *Rorison*, *supra*, per Lord Moncreiff at p. 25.

[12] *Burnet* v. *Gow*, 1896, 24 R. 156; *Mason* v. *Tait*, 1851, 13 D. 1347.

[13] *Bertram* v. *Pace*, 1885, 12 R. 798; *Milne* v. *Walker*, 1893, 21 R. 155; *Paul* v. *Jackson*, 1884, 11 R. 460; *Blasquez* v. *Lothians Racing Club*, 1889, 16 R. 893; *Christie* v. *Craik*, 1900, 2 F. 380.

[14] *M'Iver* v. *M'Neill*, 1873, 11 M. 776; *Torrance* v. *Weddell*, 1868, 7 M. 243; *Macleod* v. *Marshall*, 1891, 18 R. 811; *Christie* v. *Craik*, 1900, 2 F. 380.

[15] *Lorne* v. *Taylor*, 1844, 7 D. 117; *Burnaby* v. *Robertson*, 1848, 10 D. 855; *Powell* v. *Leng*, 1896, 23 R. 534.

[16] *Hunter* v. *Macnaughton*, 1894, 21 R. 850; *Goodall* v. *Forbes*, 1909 S.C. 1300; *Burnet* v. *Gow*, 1896, 24 R. 156.

and if he does so the counter-issue must be confined to these selected charges.[1]

1246. Short of pleading *veritas* a defender frequently desires to lead evidence as to the circumstances under which the slander complained of was uttered, usually for the purpose of mitigating damages. How far he may go in this respect is not clear.[2] It has been said that he may prove anything relevant to his defence of which he has given notice on record.[3] He may lead evidence as to the reputation of the pursuer,[4] as to the circumstances in which the slander was uttered,[5] and to shew that he merely repeated what had been reported to him.[6] He may prove the provocation he has received,[7] and in a case of privileged slander the defender may be entitled to prove that the statement complained of is true for the purpose of shewing that it was not malicious.[8]

SUBSECTION (5).—*Lodging of Productions.*

1247. All plans, maps, models, or other such productions proposed to be used at the trial of a cause, and all writings which are meant to be put in evidence, must be lodged eight days before the trial with the clerk of Court at his office in the Register House if the trial is to be in Edinburgh, and with the sheriff-clerk of the county town where the trial is to be held if the cause is to be tried on the circuit, and the lodging thereof must be at the same time intimated to the opposite agent. No other productions will be allowed to be used at the trial, unless of consent of parties or by permission of the Court, on its being made out on oath, to the satisfaction of the Court, that such productions could not be lodged eight days before the trial, nor before the period at which they are actually produced or exhibited to the opposite party, and that notice to the opposite party had been given of the particular items proposed in such case to be produced.[9] The eight days above referred to are computed by excluding the day on which the productions are lodged and including the day of trial.[10] The Act of Sederunt is imperative,[11] and where there is no reason why productions could not have been lodged eight days before the trial the productions will not be received in evidence.[12] Original documents in public registers, however, are not

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[1] *Powell* v. *Leng*, 1896, 23 R. 534.

[2] *Macleod* v. *Marshall*, 1891, 18 R. 811, at p. 816; *Henderson* v. *Russell*, 1895, 23 R. 25, at p. 32.

[3] *Henderson* v. *Russell*, *supra*, at p. 32; see, too, *Powell* v. *Leng*, *supra*.

[4] *C.* v. *M.*, 1923 S.C. 1.

[5] *Lorne* v. *Taylor*, 1844, 7 D. 117; *White* v. *Clough*, 1847, 10 D. 332; *Paul* v. *Jackson*, 1884, 11 R. 460; *Cunningham* v. *Duncan and Jamieson*, 1889, 16 R. 383.

[6] *Macculloch* v. *Litt*, 1851, 13 D. 960; *Paul* v. *Jackson*, 1884, 11 R. 460.

[7] *Thom* v. *Graham*, 1835, 13 S. 1129; *Anderson* v. *Marshall*, 1835, 13 S. 1130; *Falconer* v. *Cochrane*, 1837, 15 S. 891.

[8] *Henderson* v. *Russell*, 1895, 23 R. 25.

[9] C.A.S., F, i. 10.

[10] *Ibid.*, iv. 3.

[11] *Smith* v. *Kemp*, 1828, 4 Murray 400, at p. 402.

[12] *O'Reilly* v. *Innes*, 1821, 2 Murray 414, at p. 419; *Gall* v. *Watt*, 1827, 4 Murray 317, at p. 320; *Mason* v. *Merry*, 1830, 5 Murray 306, at p. 308; *Whitehaven and Furness Junction Rly. Co.* v. *Macfadyen*, 1849, 11 D. 846; *Great Northern Rly. Co.* v. *Inglis*, 1850, 12 D. 1194.

subject to the eight-days rule. Extracts of the documents may be lodged and the originals can be produced at the trial by anyone representing the keeper of the register.[1]

SUBSECTION (6).—*Diligence to Recover Documents.*

1248. This is competent after issues have been adjusted for the trial of the cause, although in exceptional cases it will be granted before the record is closed.[2] The party applying for it must lodge at the office in the Register House with the clerk of Court a list describing the documents required under the diligence, with a notice of motion for such diligence, thirty-six hours before it is to be moved for, and a copy of this notice and list must be served upon the agent for the opposite party.[3]

SUBSECTION (7).—*View.*

1249. In order that they may better understand the evidence subsequently to be given, it is sometimes expedient that the jury should have an opportunity of inspecting the houses, lands, or places in question to which the dispute relates.[4] This is called a "view." Where either party intends to apply for a view, thirty-six hours' intimation of a motion for that purpose must be given to the opposite party, and such motion must be made before the Lord Ordinary or the Division at least ten days previous to the trial.[5] The viewers consist of six or more of the jurors named in the common jury list or summoned as special jurors, mutually consented to by the parties or their agents. If the parties cannot agree, six or more of the first twelve in the list are selected by the clerk of Court.[6] A precept is issued to the Sheriff to whom it falls to summon the jury for the trial, requiring him to have the viewers in attendance at the place in question on a convenient date before the trial, and the matters in question are then and there pointed out to them by two persons appointed by the Court, usually one on the suggestion of each agent, who are known as shewers. The view takes place in the presence of the Sheriff or Sheriff-Substitute, who is required to sign a certificate on the precept that the view has been duly carried out.[7] The shewers may be examined as witnesses at the subsequent trial. There are special provisions where the places to be viewed are in the counties of Caithness, Sutherland, and Orkney.[8]

1250. Neither the parties nor their agents ought to be present at a view, and no discussion is permitted,[9] the purpose of a view being merely to present to the mind of the jurors the thing in reality, that they may

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[1] C.A.S., B, ii. 4.

[2] *Dalgleish's Trs.* v. *Matheson's Trs.*, 1902, 10 S.L.T. 56; *Graeme Hunter* v. *Glasgow Iron and Steel Co.*, 1908, 16 S.L.T. 15.

[3] C.A.S., F, ii. 3, 6.

[4] 55 Geo. III. c. 42, s. 29; 11 Geo. IV. & 1 Will. IV. c. 69, s. 16.

[5] C.A.S., F, i. 9.

[6] 55 Geo. III. c. 42, s. 29; *Mackenzie* v. *Ross*, 1818, 2 Murray 11; 1822, 1 Sh. App. 99.

[7] See Russell, Forms of Process before the Jury Court, App., pp. 46, 47, 80, 81; 55 Geo. III. c. 42, s. 29.

[8] 59 Geo. III. c. 35, s. 35.

[9] *Henderson* v. *Gardyne*, 1821, 2 Murray 333, at p. 339.

understand the witnesses when they describe it.[1] The shewers alone ought to speak to the viewers, and no evidence can be led. The expense of the view is borne equally by both parties in the first instance. Objection that after a view was ordered no view took place, or that it was taken part in by jurors other than those selected, will not be sustained or prevent the trial from proceeding.[2]

Section 8.—Form of Issue.

Subsection (1).—*General Issue.*

1251. The pursuer in a cause is usually the pursuer in the issue, and in that case the heading of the issues should be "Issues in which A. B. is pursuer," and not "Issues in the cause in which A. B. is pursuer."[3] Where the defender is made pursuer in the issue, the designation of the parties as pursuer and defender respectively is sometimes changed,[4] and it is the pursuer of the issue who leads in the proof.[5] Where the defender takes a counter-issue, he is pursuer of this issue, but his designation remains unaltered.[6] In modern practice the form of issue is, in most cases, very simple, since it puts a question specific as to time and place but general as to other facts.[7] The general question put in the issue is based upon the averments made on record. These may not all be relevant, but relevant averments must be proved before a pursuer can obtain a verdict.[8] The following is an example of a general issue: "Whether on or about the 12th day of November 1928, and at or near 12 Loch Street, Edinburgh, the pursuer was injured in his person through the fault of the defender, to his loss, injury, and damage?" And this would be the form of issue even where liability is admitted by the defender.[9]

Subsection (2).—*Particular Issues.*

1252. Particular issues are usually required in two classes of cases: (1) Where the pursuer puts his case on some special averment, and (2) where the defender rests his defence on a ground which a general issue of the pursuer will not disclose. An example of the first class is found in a case where a pursuer, having put his case on record upon employment by the defender, was held bound to put in issue "while in the employment of."[10] So, too, a pursuer who said he was in a railway

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[1] *Brown* v. *Stewart*, 1824, 3 Murray 444, at p. 448; *Arnot* v. *Whyte*, 1826, 4 Murray 149.

[2] 55 Geo. III. c. 42, s. 29.

[3] *Gordon* v. *British and Foreign Metalline Co.*, 1886, 14 R. 75, at p. 87; *Paterson* v. *Airdrie and Coatbridge Water Co.*, 1893, 20 R. 370, at p. 374.

[4] *Currie* v. *Macdonald*, 1834, 12 S. 568.

[5] *Macdougalls* v. *Gordon*, 1831, 9 S. 392.

[6] *Powell* v. *Leng*, 1896, 23 R. 534.

[7] *Ireland* v. *North British Rly. Co.*, 1882, 10 R. 53; *Hanlon* v. *Glasgow and South-Western Rly. Co.*, 1899, 1 F. 559.

[8] *Haughton* v. *North British Rly. Co.*, 1892, 20 R. 113; *Crannie* v. *Glengarnock Iron and Steel Co.*, 1908, 16 S.L.T. 646.

[9] *Black* v. *North British Rly. Co.*, 1908 S.C. 444.

[10] *Conroy* v. *A. & J. Inglis*, 1895, 3 S.L.T. 25; but see *M'Sorley* v. *Steel Co. of Scotland*, 1893, 20 R. 722.

station for the purpose of meeting a passenger was required to put that in issue.[1] Where also liability was sought to be established upon an unusual and novel conjunction of circumstances, the ordinary bare form of issue was departed from, and a very precise and full issue adjusted.[2] And in an action by a tenant against his landlord for damages for personal injuries due to the defective condition of the premises, the issue should contain the words "while tenant under the defender." [3]

1253. Illustrations of the second class of case are where a railway company pleaded that the pursuer was travelling without a ticket when he was injured,[4] and where the pursuer was required to put into the issue the words "while travelling as a passenger." So also where the authority of the defender's servant to do the act complained of is denied, the issue will be so adjusted as to raise the question whether the act was within the scope of the servant's employment.[5] Certain cases where particular issues were previously adjusted would probably now be sent for trial by proof before a judge alone.[6]

Subsection (3).—*Plurality of Parties.*

1254. Where two persons have sustained injuries by one and the same wrong, they may insist for damages in the same action, provided the summons contains conclusions applicable separately to each pursuer, and that each takes a separate issue.[7] When, however, several persons sue in one action for the death of a relative,[8] where liability, if established, must of necessity be established for all, while each must sue for a separate sum,[9] the case may be tried in one issue with separate schedules of damages applicable to the several conclusions of the summons.[10] Where there is only apparent and not real plurality of pursuers, as in the case of the sole partner of a firm and the firm, only one issue will be allowed, as the parties will be able to recover under it any damages that may be due.[11]

1255. Where several defenders are sued in respect of the same delict or quasi-delict, one general issue against all of them may be sufficient.[12]

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[1] *Wilson* v. *North British Rly. Co.*, 1873, 1 R. 172.

[2] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32; see *Shaw* v. *Burns*, 1911 S.C. 537.

[3] *Dickie* v. *Amicable Property Investment Building Society*, 1911 S.C. 1079.

[4] *Hamilton* v. *Caledonian Rly. Co.*, 1856, 18 D. 999; *Little* v. *North British Rly. Co.*, 1877, 15 S.L.R. 12; see *Scoullars* v. *Crawford & Fulton*, 1868, 6 M. 1128.

[5] *Maxwell* v. *Caledonian Rly. Co.*, 1898, 25 R. 550; *Wood* v. *North British Rly. Co.*, 1899, 1 F. 562; *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629; *Mackenzie* v. *Cluny Hill Hydropathic Co.*, 1908 S.C. 200.

[6] *Hutcheson & Co.* v. *Henry & Pirrie*, 1867, 6 M. 57; *M'Bride* v. *Caledonian Rly. Co.*, 1894, 21 R. 620; *Edinburgh Property Co.* v. *Ritchie & Co.*, 1903, 5 F. 299.

[7] *Harkes* v. *Mowat*, 1862, 24 D. 701; *Mitchell* v. *Grierson*, 1894, 21 R. 367; *Smith* v. *Muir*, 1891, 19 R. 81, at p. 88; *Killin* v. *Weir*, 1905, 7 F. 526.

[8] *Smith* v. *Wilsons & Clyde Coal Co.*, 1893, 21 R. 162; *Pollok* v. *Workman*, 1900, 2 F. 354.

[9] *Gray* v. *Caledonian Rly. Co.*, 1912 S.C. 339.

[10] *M'Phail* v. *Caledonian Rly. Co.*, 1903, 5 F. 306.

[11] *Smith & Co.* v. *Taylor*, 1882, 10 R. 291.

[12] *M'Cosh* v. *M'Cosh*, 1832, 10 S. 579; *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, 1894, 21 R. (H.L.) 39, at p. 42.

This is seldom desirable, however, for there is usually some doubt as to whether all of the defenders are liable, and the safer practice is to take an issue upon which a verdict against all or any one of them may be returned. This is done by inserting in a general issue at the appropriate place the words "or one or other and which of them."[1] This form of issue would also be suitable where the same pursuer is suing different defenders in separate actions for the same wrong and the actions are conjoined.[2] The practice, however, where there are several defenders has not been uniform, and separate issues have been allowed against each defender where one issue, framed as above suggested, would appear to have been sufficient to determine the question of liability.[3] Except in *Cooper's* case, however, the question of whether there should be one or two issues was not considered by the Court. Separate issues should be taken in an action for damages against an agent and his client for the wrongous use of diligence, and the full amount of damages should be inserted in each schedule.[4]

Subsection (4).—*Schedule of Damages.*

1256. This is a statement at the end of the issue or issues of the amount of damages claimed by a pursuer. A pursuer may have a single schedule or more, according to circumstances. When he sues in respect of one wrong, there is one issue and one schedule of damages. A pursuer may sue, however, in respect of separate wrongs done by the same defender. When the wrongs complained of are different, as in the case of information of an alleged crime to the police and repetition of the charge to bystanders afterwards, the proper course is to have separate issues, with separate schedules of damages applicable to each issue.[5] Where the complaint is of several wrongs done him at the same time, as of several slanders in the same letter, the practice is to have separate issues corresponding to each slander with a single schedule appended to the last issue containing the lump sum sued for. The jury may then award the whole sum under one issue.[6]

Section 9.—Issues in Particular Actions.

Subsection (1).—*Negligence.*

(i) *Personal Injury to a Stranger.*

1257. Whether on or about [*date*], and at or near [*place*], the pursuer was injured in his person through the fault of the defender,

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[1] *Jack* v. *Fleming*, 1891, 19 R. 1; *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449; *M'Innes* v. *Ayr Harbour Trs.*, 1902, 5 F. 20; *Goodall* v. *Forbes*, 1909 S.C. 1300.

[2] *West* v. *Edinburgh Tramways Co.*, 1903, 10 S.L.T. 524.

[3] *Cooper* v. *Brown and The Rosebank Foundry Co.*, 1893, 1 S.L.T. 44; *Dakers* v. *Tharsis Copper Co. and Tennant & Co.*, 1889, 27 S.L.R. 230; *Palmer* v. *Wick and Pulteneytown Shipping Co.*, 1893, 20 R. 275.

[4] *Inglis* v. *M'Intyre*, 1861, 23 D. 1240; *Smith & Co.* v. *Taylor*, 10 R. 291, at p. 299.

[5] *Douglas* v. *Main*, 1893, 20 R. 793; *Paton* v. *Brodie*, 1857, 20 D. 258; *Mackintosh* v. *Smith & Lowe*, 1864, 2 M. 389; *Forbes* v. *Wilson*, 1868, 6 M. 770.

[6] *Falconer* v. *Docherty*, 1893, 20 R. 765.

to the loss, injury, and damage of the pursuer? Damages laid at £ .

The expression "fault of the defender" includes fault of those for whom he is responsible, and it is unnecessary to put that in the issue. When the defender admits fault, that word is not omitted from the issue, although the admission will limit the proof at the trial.[1]

(ii) *Master and Servant—at Common Law.*

1258. Whether on or about , and at or near , the pursuer, while in the employment of the defender, was injured, etc.?

(iii) *Medical Man and Patient.*[2]

1259. Whether the defender, in violation of his duty to the pursuer, negligently failed to give sufficient and proper attention and care to the pursuer as his patient, in consequence of which the pursuer's finger had to be amputated, to the loss, etc.?

Subsection (2).—*Wrongful Invasion of Rights of Property.*[3]

1260. Whether on or shortly before 12th May 1893 the defender wrongfully placed a quantity of bags of manure, furnished with a tarpaulin covering, on the ground then in the occupation of the pursuer, under lease between him and the defender, of the farm of Airds, in the parish of Crossmichael, and whether on or about the said day the pursuer was injured in his person through his horse taking fright at the said bags or tarpaulin, to the loss, etc.?

Subsection (3).—*Wrongs to the Person.*

(i) *Public Authority Removing a Patient to Hospital.*[4]

1261. Whether on or about the defenders wrongfully removed , the pursuer's son, now deceased, from the pursuer's dwelling-house in , to his loss, etc.?

(ii) *Assault.*[5]

1262. Whether on or about , in or near , the defender (or the defender by his servant) assaulted the pursuer, to the loss, etc.?

(iii) *Apprehension and Detention.*[6]

1263. Whether on or about the said I. M. and M. M. maliciously and without probable cause apprehended the pursuer at

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[1] *Black* v. *North British Rly. Co.*, 1908 S.C. 444.
[2] *Farquhar* v. *Murray*, 1901, 3 F. 859; see *Edgar* v. *Lamont*, 1914 S.C. 277.
[3] *Gibson* v. *Stewart*, 1894, 21 R. 437.
[4] *Mitchell* v. *Mags. of Aberdeen*, 1893, 20 R. 253.
[5] *Wilson* v. *Bennet*, 1904, 6 F. 269; *Ellis* v. *National Free Labour Assoc.*, 1905, 7 F. 629, at p. 632.
[6] *Young* v. *Mags. of Glasgow*, 1891, 18 R. 825.

or near the house of his mother at and conveyed him to the Cranstonhill Police Office in Glasgow, to the loss, etc.?

There may be cases against police constables where it is unnecessary to insert malice and want of probable cause in the issue, and where the appropriate words would be "wrongfully and illegally,"[1] or "wrongfully and with unnecessary force and violence."[2]

1264. When a pursuer complains of false information being given against him to the police, the issue must ask whether the information was given "maliciously and without probable cause."[3] Where, however, a defender instructed the apprehension of the pursuer without accusing him of any crime, the issue merely asked whether she "wrongfully" did so.[4] When the question is as to the alleged wrongful arrest of a passenger for failure to pay his fare following upon a charge by a servant of the defender, the issue asks whether the defender "wrongfully and illegally" caused the pursuer to be arrested.[5] In a case, however, where the servant was the captain of a ship, it was held that because of the peculiar position of the captain of a ship, "maliciously and without probable cause" should be in the issue.[6] Where the pusuer's complaint was of detention in a madhouse, the words "wrongfully and illegally" were held sufficient,[7] and a case of detention in his private room by the manager of a hydropathic under peculiar circumstances was sent to trial on an issue of "wrongfully detained."[8]

Subsection (4).—*Bankruptcy—Sequestration.*

1265. Whether during the months of August, September, and October 1881 the defenders wrongfully, maliciously, and without probable cause applied for, procured, and maintained sequestration of the estates of J. & W. K. to the loss, etc.?[9]

Subsection (5).—*Wrongous Use of Diligence.*

1266. Whether in the Sheriff Court, Glasgow, the defenders , on or about , having obtained decree against the pursuer for payment of , did, on or about , wrongfully charge him or cause him to be charged upon said decree, and on or about did wrongfully serve notice of cessio upon him or cause such notice to be served, all to his loss, etc.[10]

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[1] *Harvey* v. *Sturgeon*, 1912 S.C. 974; *Shields* v. *Shearer*, 1913 S.C. 1012; 1914 S.C. (H.L.) 33.

[2] *M'Gilvray* v. *Main*, 1901, 3 F. 397.

[3] *Douglas* v. *Main*, 1893, 20 R. 793; *Shaw* v. *Burns*, 1911 S.C. 537; *Mills* v. *Kelvin and James White*, 1913 S.C. 521.

[4] *Peffers* v. *Lindsay*, 1894, 22 R. 84.

[5] *Percy* v. *Corporation of Glasgow*, 1922 S.C. (H.L.) 144; *Lundie* v. *MacBrayne*, 1894, 21 R. 1085.

[6] *Coutts & Park* v. *MacBrayne, Ltd.*, 1910 S.C. 386.

[7] *Mackintosh* v. *Smith & Lowe*, 1864, 2 M. 389.

[8] *Mackenzie* v. *Cluny Hill Hydropathic Co.*, 1908 S.C. 200, at p. 207.

[9] *J. & W. Kinnes* v. *Adam & Sons*, 1882, 9 R. 698.

[10] *MacRobbie* v. *M'Lellan's Trs.*, 1891, 18 R. 470; see also *M'Gregor* v. *M'Lauchlan*, 1905, 8 F. 70; *Clark* v. *Beattie*, 1909 S.C. 299.

Where a misuse of the forms of process is alleged, the pursuer must take an issue containing the words "maliciously and without probable cause," but where the complaint is of a misuse of diligence that in itself is a legal wrong, and these words are unnecessary in the issue.[1] Accordingly in cases arising out of poinding,[2] interim interdict,[3] and arrestment on a *meditatione fugæ* warrant [4] it is sufficient if the issue asks if these acts were "wrongful." A similar issue is suitable to try the question of whether a defender took a decree in absence in breach of an agreement not to do so,[5] but if decree is taken after payment has been made, but without any agreement not to take decree, this is a misuse of process and malice must go into the issue.[6]

Subsection (6).—*Breach of Promise.*

1267. Whether in or about the month of June 1879 the defender promised and engaged to marry the pursuer? and whether the defender wrongfully failed to implement his said promise and engagement, to the loss, etc.? [7]

Where a defender seeks to prove that he was justified in refusing to marry the pursuer, this, like the defence of contributory negligence, may be proved without a counter-issue.[8]

Subsection (7).—*Seduction.*

1268. A pursuer complaining of seduction as well as of breach of promise is entitled to an issue on each head with relative schedules of damages.[9] The issue may run as follows:—

Whether in the course of the period between December 1917 and March 1918 the defender, taking advantage of his authority and influence as her employer and by his professions of sincere affection for her, seduced the pursuer and prevailed upon her to permit him to have carnal connection with her, to her loss, etc.?

Subsection (8).—*Seduction of a Married Woman.*

1269. Whether between the 14th December 1853 and April 1855 the defender did seduce and commit adultery with , then the wife of the pursuer, in the house at Irvine occupied by her, and did maintain an adulterous connection with her in said house or elsewhere in Irvine, or in the neighbourhood thereof, to the loss, etc.? [10]

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[1] *Gordon* v. *British and Foreign Metalline Co.*, 1886, 14 R. 75, at p. 79; *M'Gregor* v. *M'Lauchlan*, 1905, 8 F. 70; *Clark* v. *Beattie*, 1909 S.C. 299.

[2] *Inglis* v. *M'Intyre*, 1861, 23 D. 1240.

[3] *Fie* v. *Orr*, 1895, 23 R. 8; *M'Gregor* v. *M'Lauchlan*, *supra*.

[4] *MfMeekin* v. *Russell & Tudhope*, 1881, 8 R. 587; *M'Gregor* v. *M'Lauchlan*, *supra*.

[5] *Gi'bson & Co.* v. *Anderson & Co.*, 1897, 24 R. 556.

[6] *Rhind* v. *Kemp & Co.*, 1893, 21 R. 275, at p. 278.

[7] *Colvin* v. *Johnstone*, 1890, 18 R. 115. [8] *Brodie* v. *Macgregor*, 1900, 8 S.L.T. 86.

[9] *Cathcart* v. *Brown*, 1905, 7 F. 951; *MacLeod* v. *MacAskill*, 1920 S.C. 72; see *Brown* v. *Harvey*, 1907 S.C. 588.

[10] *Glover* v. *Sampson*, 1856, 18 D. 609; *Macdonald* v. *Macdonald*, 1885, 12 R. 1327.

SUBSECTION (9).—*Slander.*

1270. Whether on or about 14th October 1891, in the house at , occupied by T. M., the defender falsely and calumniously stated to the said T. M. (or in the presence and hearing of W. E., F. L., or one or more of them) that the pursuer had poisoned his wife, Mrs. A. M., or used words of like import and effect, to the loss, etc.? [1]

The time when, place where, and persons to whom the slander was uttered must all be put in the issue in a case of slander.[2] When the slander has been uttered in writing, the person to whom it has been sent must be stated. If it has been published in a newspaper, however, the fact of publication merely is put in issue.[3] When the slander has been uttered in a foreign language, the words must be set forth on record as having been uttered in that language and their English equivalent must be set forth in the same way as an innuendo is set forth,[4] and the issue would, of course, have to conform to the record. Where the statement complained of is lengthy, it is usually set forth in a schedule. In such a case the issue asks: "Whether (or it being admitted that) the defender used (or wrote or published) the words in the schedule hereto annexed or part thereof or words to that effect (and whether), said words are in whole or in part of and concerning the pursuer and are false and calumnious, to the loss, etc.? [5]

1271. The issue must be specific as to the time, place, and person in whose presence the slander was uttered. A latitude of a month, however, has been allowed in specifying the time,[6] and even more where a repetition of the slander was alleged.[7] But in an issue as to whether the slander alleged was uttered "on or about 12th March 1912," where the jury found that the slander had been uttered by the defender at the place and in the circumstances set forth in the issue, but in February 1912, the Court, on account of the discrepancy in the dates, directed that the verdict should be entered for the defender.[8]

1272. Sometimes the words complained of require an innuendo to make them actionable, and in that case the innuendo must be set out in the record and also put in the issue.[9] It is introduced in the issue by such words as "meaning thereby that the pursuer" or "falsely and calumniously representing that the pursuer," and these are the appro-

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[1] *Reid* v. *Coyle*, 1892, 19 R. 775.

[2] *Walker* v. *Cumming*, 1868, 6 M. 318; *Broomfield* v. *Grey*, 1868, 6 M. 992.

[3] *Sexton* v. *Ritchie & Co.*, 1890, 17 R. 680; 1891, 18 R. (H.L.) 20; *Morison* v. *Ritchie & Co.*, 1902, 4 F. 645.

[4] *Mackie* v. *M'Lean*, 1844, 6 D. 981; *Bernhardt* v. *Abrahams*, 1912 S.C. 748; see *Anderson* v. *Hunter*, 1891, 18 R. 467.

[5] *Crabbe & Robertson* v. *Stubbs, Ltd.*, 1895, 22 R. 860, at p. 866; *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449, at p. 467; *Lever Bros., Ltd.* v. *The Daily Record*, 1909 S.C. 1004.

[6] *Grant* v. *Fraser*, 1870, 8 M. 1011.

[7] *Lockhart* v. *Cumming*, 1852, 14 D. 452.

[8] *Smith* v. *Paton*, 1913 S.C. 1203.

[9] *Smith* v. *Walker*, 1912 S.C. 224; *James* v. *Baird*, 1915 S.C. 23 and 1916 S.C. (H.L.) 158; *Langlands* v. *John Leng & Co.*, 1916 S.C. (H.L.) 102.

priate words to introduce the innuendo whether the words complained of are in the issue or in a schedule annexed to it.[1] Two innuendoes founded on the same statement may be inserted in one issue,[2] and alternative innuendoes have also been allowed in one issue.[3]

1273. Where a general slanderous charge such as dishonesty is made, and specific instances in support of it are given, the person complaining of the general charge may select one or more instances to put in issue and need not insert them all.[4]

1274. It may be clear on the face of a pursuer's own averments that the slander he complains of was uttered on a privileged occasion, or even on an occasion when want of probable cause requires to be proved—as to these see DEFAMATION.[5] In the first case the issue would ask whether the words were used "falsely, calumniously, and maliciously," and in the second case whether they were used "falsely, calumniously, maliciously, and without probable cause." An issue in these terms will not be allowed, however, unless there are relevant averments of malice against the defender on record,[6] and where want of probable cause is also necessary the issue will be disallowed if the Court is satisfied from the pursuer's own statement that the defender had probable cause.[7] The question of privilege, however, may not arise on the pursuer's averments, but may be raised by the averments made by the defender. In that case "maliciously" or "maliciously and without probable cause" should not be inserted in the issue. If it should appear in the course of the trial that the slander was uttered on a privileged occasion, the pursuer would be bound to prove malice, and, if necessary, want of probable cause as a condition of success, but he would only be allowed to prove them if he had relevantly averred on record facts and circumstances out of which malice and want of probable cause might be inferred.[8]

SUBSECTION (10).—*Holding Up to Public Hatred and Contempt.*

1275. Whether on 18th January 1916, in the parish hall at Denny, the defender, in the presence and hearing of a meeting of the Denny Parish Church Work Party and of [*certain persons named*], members of said Denny Parish Church Work Party, or one or more of them, stated of and concerning the pursuer that the pursuer had in the defender's manse at Denny three days before stated to him that the soldiers (meaning thereby British soldiers in the present war) went into the trenches to have an easy time, and if they were not shot they deserved to be, or used words of similar import and effect at said meet-

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[1] *Wright and Greig* v. *Outram & Co.*, 1889, 16 R. 1004; *Lever Bros., Ltd.* v. *The Daily Record, Ltd.*, 1909 S.C. 1004; *James* v. *Baird*, 1915 S.C. 23.

[2] *Oliver* v. *Laidlaw*, 1895, 3 S.L.T. 142.

[3] *Macculloch* v. *Litt*, 1850, 13 D. 334.

[4] *Powell* v. *Leng*, 1896, 23 R. 534.

[5] Vol. V. p. 483, *ante*.

[6] *Hayford* v. *Forrester Paton*, 1927 S.C. 740; *Gorman* v. *Moss' Empires*, 1913 S.C. 1.

[7] *Craig* v. *Peebles*, 1876, 3 R. 441.

[8] *Wilson* v. *Purvis*, 1890, 18 R. 72; *Suzor* v. *Buckingham*, 1914 S.C. 299.

ing, whether the said statements are false and calumnious and were made with the design of exposing, and did expose, the pursuer to public hatred, ridicule, and contempt, to the loss, etc.? [1]

SUBSECTION (11).—*Reduction of Deeds.*

(i) *Total Incapacity of Granter.*

1276. Whether the pretended trust disposition and settlement, dated , No. 8 of process, is not the deed of the late ? [2]

(ii) *Fraud and Circumvention.*

1277. Whether on or about the late was weak and facile in mind and easily imposed upon, and whether the defenders , or one or other of them, and which of them, taking advantage of the said weakness and facility, did by fraud or circumvention impetrate from him the trust disposition and settlement, No. 8 of process, to his lesion? [3]

This is the usual form of issue to try the question of whether a will has been impetrated from a testator by fraud, but it may in suitable cases be used to try the question of whether any deed or document has been impetrated from the granter.[4] If a will is challenged on the ground that it has been obtained by undue influence, the proper mode of inquiry is by proof before a judge.[5]

(iii) *Essential Error.*

1278. There are cases where a deed may be set aside on the ground that it was signed by the pursuer under essential error,[6] as, for example, where there was error as to the *corpus* of the document which had been signed,[2] but they are few and far between.[7] The more common cases are those where the essential error has been induced by misrepresentation, and in that case the issue would be:—

Whether the pursuer signed the letter dated 27th March 1906 while under essential error as to a material part of the contract, induced by the misrepresentations of the defender? [8]

Where fraudulent misrepresentation is complained of the issue would be:—

Whether the pursuer was induced to sign the missive letter dated 27th March 1906 by the fraudulent misrepresentation of the defender? [8]

If the fraudulent misrepresentation has been made by a person other than the defender, that person's name should be put in the issue and the words "on behalf of the defender" added.[9]

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[1] *Andrew* v. *Macara*, 1917 S.C. 247; cf. *Paterson* v. *Welch*, 1893, 20 R. 744.
[2] *Gibson's Exr.* v. *Anderson*, 1925 S.C. 774.
[3] *Gibson's Exr.* v. *Anderson*, *supra*; *Ross* v. *Gosselin's Exrs.*, 1926 S.C. 325.
[4] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25.
[5] *Ross* v. *Gosselin's Exrs.*, 1926 S.C. 325. [6] *M'Laurin* v. *Stafford*, 1875, 3 R. 265.
[7] *Ellis* v. *Lochgelly Iron and Coal Co.*, 1909 S.C. 1278.
[8] *Hart* v. *Fraser*, 1907 S.C. 50. [9] *Beresford's Trs.* v. *Gardner*, 1877, 4 R. 366.

(iv) *Force and Fear.*

1279. Whether the bill of exchange, No. 6 of process, was obtained by from by force and fear without his having received any value therefor? [1]

Subsection (12).—*Right of Way.*

1280. Whether for forty years and upwards or for time immemorial prior to 1892 there has been a public road or right of way for carts, horses, cattle, and foot-passengers, or any and which of them, leading from Culter, in the county of Lanark, in a south-westerly direction past Birthwood to Lamington in said county, as shewn and coloured red in the plan, No. 36 of process, herewith produced, and marked thereon with the letters, etc.? [2]

Section 10.—Time and Notice of Trial.

1281. After issues have been adjusted the Lord Ordinary before whom the cause depends must fix a day for the trial of the cause.[3] If the day so appointed is later than the next ensuing vacation of the Court, or Christmas recess, as the case may be, any party to the cause may at any time prior to a day three weeks before the said ensuing vacation or recess enrol the cause before the Lord Ordinary, and give notice to the other party that he wishes the cause tried at the sittings in the said vacation or recess. After hearing parties the Lord Ordinary decides whether the trial shall proceed at the sittings or before himself on the day already fixed or on another day, and very strong grounds must be shewn for interfering with his decision.[4] Conflicting decisions have been given as to whether the cause must not only be enrolled but the motion made to the Lord Ordinary three weeks before the vacation or recess.[5] If the cause is to be tried at the sittings the process must be transmitted to the clerk of the Division to which the cause is marked by the agent of the party who gave the notice for trial at the sittings. A copy of the interlocutor allowing the trial to proceed at the sittings, along with a print of the closed record and of the adjusted issues, must also be handed to the Keeper of the Rolls of the Division.[6] Notification is given in the daily rolls of Court of the latest date on which a copy of the Lord Ordinary's interlocutor allowing a trial to proceed at the sittings, along with a print of the closed record and of the adjusted issues, must be handed to the Keeper. Where these papers are not lodged in time, the Court will not grant authority to the Keeper to

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[1] *Gelot* v. *Stewart*, 1870, 8 M. 649; cf. *Young* v. *Healy*, 1909 S.C. 687.

[2] *Paterson* v. *Airdrie and Coatbridge Water Co.*, 1893, 20 R. 370; cf. *Robertson* v. *Duke of Atholl*, 1905, 8 F. 156.

[3] C.A.S., F, i. 3.

[4] C.A.S., F, i. 4; *Casey* v. *Casey*, 1912 S.C. 1325.

[5] *Meades* v. *Beardmore & Co.*, 1913, 2 S.L.T. 171; *Watson* v. *Jardin*, 1916, 2 S.L.T. 148.

[6] C.A.S., F, i. 5.

receive them, but will discharge the order for trial and remit to the Lord Ordinary to proceed.[1] The Lord Ordinary then appoints a new diet for the trial of the cause.[2]

Section 11.—Postponement of Trial.

1282. Until the jury is empanelled and sworn to try a cause [3] it is competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness or for other sufficient cause proved to the satisfaction of the Court or the presiding judge and supported by oath or affidavit if the Court or presiding judge shall so require, or in vacation by the judge before whom motions are to be heard, and upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial; [4] but if the inability of a material witness to attend at a trial, or any other cause for putting it off, becomes known to the party during the session, the motion to put off the trial must be made if practicable in the session, after intimation to the opposite party.[5]

1283. The absent witness must be a material witness [6] and his absence must be temporary.[7] It was considered a sufficient cause for postponement that the pursuer was in jail, and that a few days before the trial there had been a change of agency and the new agent was of opinion that the materials for the trial were incomplete, and could not be completed before the date fixed,[9] and that there was a very short time between the adjustment of issues and the trial at the sittings.[9] It was held not to be a sufficient cause for the postponement of a trial that a defender wished to examine on commission a witness resident abroad,[10] that he wished to await the result of a commission which he had not been reasonably diligent in applying for,[11] or that a material witness was abroad and the address of another one was unknown.[12] Poverty which has not supervened since the raising of the action is no reason for postponement.[13] It was also refused where a pursuer desired time to examine documents eight days before a trial.[14]

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[1] *Campbell* v. *Osborne & Hunter*, 1913 S.C. 758.
[2] *Robertson* v. *Hamilton*, 1915, 2 S.L.T. 195.
[3] *Nixon* v. *Houston*, 1898, 1 F. 78.
[4] *Nixon* v. *Houston, supra*; *Hamilton* v. *Hall*, 1906, 13 S.L.T. 756.
[5] C.A.S., F, i. 6, 11, 14.
[6] *Mackintosh* v. *Fraser*, 1859, 21 D. 783; *Leadhills Mining Co.* v. *Scots Mines Co.*, 1860, 22 D. 989; *Wylie & Lochhead* v. *Times Fire Insurance Co.*, 1860, 22 D. 1498.
[7] *Leadhills Mining Co.* v. *Scots Mines Co., supra*; *Wylie & Lochhead* v. *Times Insurance Co., supra.*
[8] *Scott* v. *Christie's Trs.*, 1856, 19 D. 195.
[9] *Robertson* v. *Hall*, 1901, 3 F. 637.
[10] *Conacher* v. *Conacher*, 1859, 21 D. 597; *National Exchange Co.* v. *Drew & Dick*, 1861, 23 D. 1278.
[11] *Simmies* v. *Burnet & Reid*, 1875, 12 S.L.R., 622.
[12] *Casey* v. *Casey*, 1912 S.C. 1325.
[13] *Gordon* v. *Davidson*, 1865, 3 M. 595.
[14] *British Workman and General Assurance Co.* v. *Stewart*, 1897, 24 R. 624.

Section 12.—Abandonment.

1284. Prior to the closing of the record any action may be abandoned by a pursuer, subject to such conditions as the Court may impose. After the record is closed, any action, whether it is a jury action or not, may be abandoned under the Judicature Act [1] or under the Court of Session Act, 1868.[2] Under the former Act a pursuer may abandon his cause on paying full expenses to the defender, and may bring a new action if otherwise competent. Under the latter Act any action may, with leave of the judge, be abandoned on the conditions contained in the Judicature Act and relative Act of Sederunt, in the course of a trial, at any time before the judge has commenced to charge the jury, or where there is no jury, at any time before the judge has made avizandum with the evidence. Leave of the judge, however, must be obtained, and he must be of opinion that it is just and proper under the circumstances. In granting leave the judge must specify the time within which the expenses shall be paid to the defender, and if they are not paid within such time the defender is entitled to be assoilzied from the conclusions of the action, with expenses.

1285. It is competent to abandon under the Judicature Act even after notice of motion for absolvitor has been given by the defender,[3] but it is doubtful if a partial abandonment of an action is competent at any time.[4] In an action abandoned under the Judicature Act, the Court has no power to modify the expenses payable to the defender.[5]

1286. The foregoing methods of abandonment are applicable to actions generally, but in jury cases there are certain circumstances in which a party is held as confessed. If it shall be made to appear to the Lord Ordinary or the Division, as the case may be, that a party has abandoned his suit, or if the pursuer, or the party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally approved, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause for delay be shewn to the satisfaction of the Court. And in case either party shall not appear at the trial of a cause, if the party appearing be the pursuer in the issue, he is entitled to lead evidence and go to the jury for a verdict; and if the party appearing be the defender in the issue, he is entitled to obtain a verdict in his favour without leading evidence. If the party appearing declines to proceed in this manner, then, in cases set down for trial at the sittings, the judge presiding at the trial must certify to the Division the fact of the other party not appearing, and the Division must thereupon proceed as in cases in which parties are held as confessed, unless it is shewn to the satisfaction of the Court that the

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[1] 6 Geo. IV. c. 120, s. 10. [2] 31 & 32 Vict. c. 100, s. 39.

[3] *Exrs. of A. B.* v. *The Scottish Widows' Fund and Life Assurance Society*, 1858, 20 D. 1073.

[4] *M'Sorley* v. *Archibald*, 1922 S.C. 26; see *Hay* v. *Earl of Morton*, 1862, 24 D. 1154.

[5] *Mica Insulator Co.* v. *Bruce Peebles & Co.*, 1907 S.C. 1293.

failure of the party to appear at the trial was occasioned by some sufficient cause. Where cases are set down for trial by the Lord Ordinary he also proceeds as in cases where parties are held as confessed, unless sufficient cause for failure to appear is shewn.[1] These provisions apply to new trials as well as to first trials.[2]

1287. If a defender satisfies the Court that the pursuer has abandoned his case, he is entitled to absolvitor. Abandonment was inferred from failure to pay expenses after abandonment under the Judicature Act, and absolvitor was granted.[3] Similarly failure to pay the fee fund dues necessary to obtain a precept for citation of a jury has been held to be abandonment,[4] and a pursuer has also been held to have abandoned his cause when, his counsel and agents having withdrawn and the diet for trial having been discharged, he did not appear to oppose a motion for absolvitor.[5]

1288. Where parties are held as confessed the opposite party is entitled to absolvitor [6] unless sufficient cause to the contrary is shewn. Sufficient cause was held to have been shewn when the delay was occasioned by the engagements of the Lord Ordinary,[7] and by the defender in changing his agents,[8] and in executing a commission.[9] An understanding between agents that the case was not to go to trial within the twelve months,[10] and a recognition by them of the inexpediency of doing so,[11] have also been held sufficient cause. It is not sufficient cause, however, that the defender is notoriously insolvent,[12] or notour bankrupt,[13] or that the pursuer is unable to pay the expenses which he has been ordered to pay as a condition of being allowed to amend his record and to proceed with his action.[14]

1289. A pursuer proceeds to trial within twelve months if he gives notice of motion for the trial of the cause within twelve months of the adjustment of issues, although the trial itself cannot proceed within that time.[15]

Section 13.—Procedure at Trial.

Subsection (1).—*Balloting of Jury.*

1290. For the balloting of a jury and the subsequent procedure in a criminal jury trial, see Crime.[16] In a civil jury trial when the Court

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[1] C.A.S., F, iv. 4; *Ritchie* v. *Anderson*, 1848, 10 D. 454. [2] C.A.S., F, iv. 1.
[3] *Ross* v. *Mackenzie*, 1889, 16 R. 871; *Donnelly* v. *Morrison*, 1895, 2 S.L.T. 582.
[4] *Mooney* v. *Wm. Dixon, Ltd.*, 1897, 24 R. 1187; *M'Millan* v. *North British Rly. Co.*, 1914, 2 S.L.T. 309; *Donaghy* v. *M'Gorty*, 1916 S.C. 643.
[5] *Gilhooly* v. *M'Hardy*, 1897, 24 R. 1185.
[6] *Bett* v. *Aberdein*, 1853, 16 D. 322; *Kerr* v. *Boswell's Reps.*, 1858, 20 D. 959; *Stewart* v. *Buik*, 1859, 21 D. 510; *Hampton* v. *Mitchell*, 1885, 12 R. 969; *Russell* v. *M'Knight's Trs.*, 1900, 2 F. 520. [7] *Baird* v. *Cornelius*, 1881, 8 R. 982.
[8] *Stobie* v. *Melvin*, 1865, 1 S.L.R. 52. [9] *Rayner* v. *Scott*, 1868, 5 S.L.R. 613.
[10] *Angus* v. *Grier*, 1853, 16 D. 303; *Blair* v. *Blair*, 1860, 22 D. 1271.
[11] *Cullen* v. *Johnston*, 1862, 24 D. 800. [12] *Butters* v. *Macdonald*, 1860, 22 D. 986.
[13] *Hampton* v. *Mitchell*, 1885, 12 R. 969.
[14] *Smith* v. *William Dixon, Ltd.*, 1910 S.C. 230.
[15] *Maclaren* v. *Robertson*, 1859, 22 D. 278; *Couston* v. *Miller*, 1863, 1 M. 508; *Wilson* v. *Haggart*, 1863, 1 M. 1115. [16] Vol. V. p. 245, *ante*.

meets on the day fixed for the trial the clerk of Court first calls over the names of all the jurors who have been summoned, and every person who fails to answer to his name after it has been called three times may be fined a sum not exceeding £5 and not less than 40s. unless some reasonable cause of absence is proved by oath or affidavit to the satisfaction of the judge.[1] Thereafter the jurors for the trial of the cause are chosen in open Court from the list of persons summoned: "and for that purpose the clerk of Court shall cause the name and designation of each juror to be written on a separate piece of paper or parchment, all the pieces being of the same size, and shall cause the pieces to be rolled up as nearly as may be in the same shape, and the names of the special jurors shall be put together into one box or glass, and the remainder into another, and being respectively mixed, the clerk shall draw out the said pieces of papers or parchment one by one from both boxes or glasses in the proportion of one from the box containing the names of special jurors and two from the other box; and if any of the persons whose names shall be so drawn shall not appear, or shall be challenged with or without cause assigned, and be set aside, then such further number shall be drawn until the number required for the trial shall be made out; and the persons so drawn and appearing, and being sworn, shall be the jury to try the cause, and their names shall be taken down and recorded, according to the present law and practice; but providing that when challenges are made, and jurors set aside, their places shall be filled up with other names, by drawing by ballot as aforesaid from the box or glass containing the description of jurors challenged respectively." [2]

1291. Each party may challenge four jurors without assigning any cause,[3] and where there were two defenders in one case it was held that they had only four challenges between them.[4] Whether the same rule is applicable to special juries has not been decided.[5] The rule is not applicable to a criminal trial where both the prosecutor and each person on trial under the same indictment has the right to challenge five jurors without cause.[6] The challenge must be made when the name of the juror is drawn,[6] and it is too late to do so after the name of the juryman has been entered in the sederunt book of the Court, but before the jury is sworn.[7] Not more than two special jurors can be challenged without cause.[6] If a number of persons are charged in one indictment but are tried in sets, the right to challenge jurors is limited to those actually on trial.[8] Unless the prosecutor and the persons in the other sets agree, a fresh jury must be empanelled to try them.

1292. At common law each party has an unlimited right of challenge on cause shewn. The usual grounds of challenge have been avowed enmity of a juror to the party challenging, or that the juror challenged

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[1] 55 Geo. III. c. 42, s. 22.
[2] 31 & 32 Vict. c. 100, s. 44.
[3] 55 Geo. III. c. 42, s. 21.
[4] *Dobbie* v. *Johnston & Russell*, 1861, 23 D. 1139.
[5] *Duke of Buccleuch* v. *Cowan*, 1866, 5 M. 214.
[6] 6 Geo. IV. c. 22, s. 16.
[7] *Dawson* v. *M'Lennan*, 1863, 4 Irv. 357.
[8] *Lord Advocate* v. *M'Leod*, 1888, 1 White 554.

has an interest in the cause. Challenges for cause assigned are made before challenges without cause.[1] Objection to any juror who may be returned as qualified in respect of insufficient qualification can only be proved by the oath of the juror objected to.[2] Where, owing to the number of objections with and without cause, it has been impossible to select a sufficient number of jurymen, statutory provision has been made for completing the number.[3]

Subsection (2).—*Oath of Jurors.*

1293. After the jury has been selected the clerk of Court administers to them the oath. In criminal cases it is in these terms:—

Do you fifteen swear by Almighty God, and as you shall answer to God at the great day of judgment, that you will the truth say and no truth conceal so far as you shall pass in this assize?

The form of this oath is of very ancient origin. The requirement that jurors should swear that they will the truth say and no truth conceal is laid down in the *Regiam Majestatem* in these words: *Jurare autem quilibet illorum debet; quod ad hoc ad quod vocati sunt, scienter veritatem non tacebunt nec falsens dicunt.*[4] *Quo tempore procedendum est ad assisam;* and in Scots Acts,[5] where the corresponding passage in Glanvil is given.

1294. The oath in civil cases is statutory [6] and is as follows:—

You swear by God, and as you shall answer to God at the great day of judgment, that you shall well and truly try these issues [*or* this issue] and a true verdict give according to the evidence.

1295. If a juror objects to be sworn and states as the ground of such objection that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he may make a solemn affirmation instead of taking an oath, and this affirmation shall have the same force and effect as an oath.[7]

Subsection (3).—*Evidence and Speeches of Counsel.*

1296. As soon as the jury has been empanelled and sworn for the trial of the issue or issues, one of the counsel for the pursuer opens the case. Thereafter the evidence for the pursuer, whether parole or documentary or both, is produced. When the evidence for the pursuer is closed, one of the counsel for the defender opens his case and makes his observations on the case for the pursuer. Then the evidence for the defender is produced, and when that is closed the pursuer may move the Court for leave to lead evidence in replication.[8] Whether such evidence should be allowed is entirely in the discretion of the presiding judge. If he uses his discretion so unjustly as to produce a miscarriage of

[1] 55 Geo. III. c. 42, s. 21. [2] 6 Geo. IV. c. 22, s. 16. [3] 55 Geo. III. c. 42, s. 28.
[4] Lib. i. p. 12. [5] Thomson, i. 140 (2nd ed.); see Hume on Crimes, ii. 316.
[6] 55 Geo. III. c. 42, s. 31. [7] 51 & 52 Vict. c. 46, s. 1.
[8] *Livingstone* v. *Strachan, Crerar & Jones,* 1923 S.C. 794, at pp. 801, 810.

justice a new trial may be granted.[1] Evidence in replication has been allowed in cases of surprise or to discredit the defender's witnesses.[2] In such cases the evidence must be confined to the points on which the proof in replication was allowed.[3]

1297. After the whole proof has been led one counsel for the pursuer addresses the jury and one counsel for the defender replies.[4] Formerly if the defender neither called any witnesses nor produced any written evidence there was no right of reply on the part of the pursuers,[5] but now in every case one counsel for the pursuer and one counsel for the defender are heard in their order after the whole evidence in the cause is led.[6] In the examination of witnesses, the counsel who begins the examination and cross-examination must continue it till it is finished, and the re-examination by the counsel who examined in chief must be strictly confined to such new matter as may have arisen in cross-examination, unless with permission of the presiding judge.[7] In cross-examination it is competent for counsel to examine a witness as to all pertinent facts and circumstances, and it is no objection that the questions put are not cross to those put in the original examination.[8]

1298. In all questions as to the admissibility of evidence or other points occurring in the course of a trial the general rule is that one of the counsel for the party for whom the objection is made is first heard, then the opposite counsel, and then the same counsel in reply; but in cases of difficulty and moment the presiding judge may permit more counsel than one to be heard.[9] Where counsel for either party excepts to the admission or rejection of evidence by the presiding judge, he must deliver a note of the exception to the judge at the time the exception is taken; and if the note states correctly what was decided by the judge, it must be certified by the judge at the time by subscribing his name to such note. A note of all exceptions taken in the course of the trial must be finally settled and certified before the jury is enclosed to consider their verdict.[10] An exception to the admission or rejection of evidence may be made the ground of an application to set aside the verdict either by motion for a new trial or by bill of exceptions.[11]

Subsection (4).—*Withdrawal of Case from Jury.*

1299. It is unusual for a judge to withdraw a case from the jury after the pursuer's evidence has been led,[12] but it is quite competent to do so.[12] The usual grounds for withdrawal are, either that the facts proved

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[1] *Rankine* v. *Roberts*, 1873, 1 R. 225, at pp. 229–231.
[2] *Chatto* v. *Pyper*, 1827, 4 Murray 351, at p. 356.
[3] *Mackellar* v. *Lambert*, 1829, 4 Murray 541, at p. 546.
[4] C.A.S., F, ii. 1.
[5] A.S., 16th February 1841, s. 27.
[6] 13 & 14 Vict. c. 36, s. 44.
[7] C.A.S., F, ii. 2.
[8] *Ibid.*, 4.
[9] *Ibid.*, 3.
[10] *Ibid.*, 7.
[11] 31 & 32 Vict. c. 100, s. 34; see *Gilmour* v. *Hansen*, 1920 S.C. 598; *Livingstone* v. *Strachan, Crerar & Jones*, 1923 S.C. 794.
[12] *Tully* v. *North British Rly. Co.*, 1907, 46 S.L.R. 715, at p. 718; *Mitchell* v. *M'Harg & Son*, 1923 S.C. 657, at p. 664.

at the trial are quite different from the averments on record[1] or that the pursuer has failed to produce evidence sufficient in law to prove the averments he has made on record.[2]

Subsection (5).—*Settlement of Cause by Minute.*

1300. In cases in which the parties, instead of taking the verdict of a jury, agree to settle the cause either by compromise, judicial reference, or in any other way, a minute must be given in, signed by the parties or by their counsel, to which the judge must interpone his authority by signing it.[3] If a case is compromised at the sittings of the Inner House, the joint minute does not require to be remitted to the Outer House in order to have authority interponed to it.[4]

Subsection (6).—*Judge's Charge.*

1301. After the whole evidence has been led and counsel on both sides have addressed the jury, it is the duty of the presiding judge to charge the jury upon the whole case. He usually reviews the evidence, and suggests to the jury the possible views that may be taken of it,[5] giving particular prominence to the view that commends itself to him. If, however, the facts are simple, and the jury require no guidance upon them, the judge may confine himself to laying down the law applicable to the case. This he should do clearly and unambiguously. If either side objects to any direction in law which the judge gives to the jury, exception should at once be taken to it. To except at the end of the charge may be too late.[6]

Subsection (7).—*Verdict.*

1302. A jury, if unanimous, may return a verdict at any time. If it is not unanimous it may not, except by consent of parties, return a verdict by a majority until the expiry of three hours after it has been enclosed. Where the division of opinion is equal, six against six, and remains so for twelve hours from the time the jury was enclosed to consider its verdict, it is then discharged from delivering a verdict. If, however, all the members of the jury agree in asking the judge to give them further time to consider their verdict, the judge must grant them such further time as they desire.[7] The verdict is declared by the chancellor or foreman of the jury verbally in open Court. The chancellor or foreman of the jury is the juror chosen by a majority of the jurors after they have been sworn. Where there is an equality of votes the juror

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[1] *Tully* v. *North British Rly. Co.*, 1907, 46 S.L.R. 715; *Mitchell* v. *Caledonian Rly. Co.*, 1910 S.C. 546, at p. 548; *Livingstone* v. *Strachan, Crerar & Jones*, 1923 S.C. 794.

[2] *M'Cafferty* v. *Lanarkshire Tramways Co.*, 1910 S.C. 797; *Cook* v. *Paxton*, 1910, 48 S.L.R. 7.

[3] C.A.S., F, ii. 8.

[4] *Bell* v. *Hamilton's Trs.*, 1890, 17 R. 811.

[5] *Gelot* v. *Stewart*, 1871, 9 M. 957.

[6] *M'Kibbin* v. *Glasgow Corporation*, 1920 S.C. 590.

[7] 55 Geo. III. c. 42, s. 35; see *Mackenzie* v. *Roy*, 1830, 5 Murray 257, at p. 272.

first sworn has a double vote for the election of chancellor.[1] The verdict, after being declared by the chancellor, is taken down by the clerk of Court in writing. It is then read to the jury and they are asked if that is their verdict.[2] Thereafter it is indorsed on the written interlocutor of the Court of Session directing the issue.[1]

1303. Where a jury returned a verdict for the pursuer, but in answer to a question put by the presiding judge stated that they considered the deceased person in fault as well as the defenders, a verdict for the defenders was entered.[3] It is incompetent to shew by the evidence of jurymen after they have been discharged that the verdict does not correctly represent the result at which the jury arrived. Where a verdict on one of the issues presented to the jury exhausts the case, and leads either to decree as craved or to absolvitor, any answer on the remaining issues is matter, not of right, but of convenience.[4] In a case where two defenders were called and separate sums of damages were claimed from each of them, and where the issue asked whether the death of the deceased was due to the fault of the defenders, or one or other and which of them, it was held that the jury, after finding both defenders in fault, were entitled to apportion the damages payable by them in different degrees.[5]

1304. A jury may find a verdict in favour of one or other of the parties subject to the opinion of the Court on a point of law reserved.[6] If the direction of the presiding judge upon the point reserved has been erroneous, the Court may direct the verdict to be entered for the other party in whole or in part absolutely, or in such terms as it may think fit; or it may, if necessary, set aside the verdict and order a new trial. There appear to have been very few verdicts of this sort returned for many years.

1305. A jury may also return a special verdict. A special verdict finds for neither party, but finds certain facts to which the Court has to apply the law, and to enter up the verdict accordingly.[7] Where a special verdict is to be found, such finding may by consent of parties be settled out of Court by the notes of the judge who tried the issue or otherwise, but if the parties do not consent to that mode of settling the special verdict the different parts of the evidence must be stated to the jury in order that they may find the facts which are to constitute the special verdict.[8] Any other method of finding a special verdict would now seem to be illegal.[9] In a case where parties by minute agreed that the jury should assess the damages on the footing of the defender's liability, and that the Court should determine the question

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[1] 55 Geo. III. c. 42, s. 33.
[2] *Pirie* v. *Caledonian Rly. Co.*, 1890, 17 R. 1157, at p. 1161.
[3] *King* v. *North British Rly. Co.*, 1874, 12 S.L.R. 53.
[4] *Campbell* v. *Scottish Educational News, Ltd.*, 1906, 8 F. 691, at p. 701.
[5] *M'Innes* v. *Ayr Harbour Trs.*, 1902, 5 F. 20.
[6] 31 & 32 Vict. c. 100, s. 36; *Murray* v. *Arbuthnot*, 1870, 9 M. 198.
[7] *Murray* v. *Arbuthnot*, *supra*, at p. 203.
[8] C.A.S., F, ii. 6.
[9] See Macfarlane on Jury Trial, p. 242.

of legal liability on the record and notes of evidence, and where at the request of parties the judge asked the opinion of the jury on a question of fact, it was held that the Court was not bound by the jury's opinion.[1] Special verdicts, although not unknown,[2] have never been common, and they are now almost obsolete.

1306. It is lawful to substitute a special case signed by counsel for a special verdict. Where this is done the order for trial, or the jury, if one has been empanelled, is discharged without returning a verdict. The special case has the like force and effect as a special verdict.[3] The advantage of a special case has been said to be that the jury are not called on to find anything, but it is made up by counsel of consent from the notes of the judge.[4] Although the Court of Session Act of 1868 contains the first statutory provision with reference to these special cases,[5] they are said to have been quite recognised in the practice of the Court long before that time.[6] There are, however, few illustrations of them in reported cases.

Section 14.—Motion for New Trial.

Subsection (1).—*Generally.*

1307. The only means by which the verdict of a jury may be brought under review is by motion for a new trial, with or without a bill of exceptions.[7] It is competent for the party who is dissatisfied with a verdict to apply to the Division of the Court to which the cause belongs for a new trial on the following grounds:—

(1) That the verdict is contrary to the evidence.
(2) Misdirection of the judge.
(3) Undue admission or rejection of evidence.
(4) Excess of damages.
(5) *Res noviter veniens ad notitiam.*
(6) Such other cause as is essential to the justice of the case.

It is, however, settled that where the motion for a new trial is made on the ground of misdirection of the judge, or the undue admission or rejection of evidence, it will not be entertained unless the party making it has at the time objected to the direction of the judge or to his admission or rejection of evidence and has asked the judge to note his objection.[8] If he has done so, he can have the verdict reviewed either by way of motion for a new trial or by way of bill of exceptions.[9]

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[1] *Adams* v. *Glasgow and South-Western Rly. Co.*, 1875, 3 R. 215.
[2] *Fife* v. *Fife's Trs.*, 1817, 1 Murray 88, at p. 121; *Murray* v. *Tod*, 1817, 1 Murray 222, at p. 224; *Macfarlane* v. *Morrison*, 1865, 4 M. 257.
[3] 31 & 32 Vict. c. 100, s. 38.
[4] *Tailors of Aberdeen* v. *Munro*, 1829, 5 Murray 78, at p. 82.
[5] See, however, 59 Geo. III. c. 35, s. 20, now repealed.
[6] Macfarlane on Jury Trial, p. 241.
[7] 55 Geo. III. c. 42, ss. 6, 7.
[8] *Campbell* v. *Campbell*, 1834, 12 S. 870; *M'Clelland* v. *Rodger & Co.*, 1842, 4 D. 646.
[9] *Mitchell* v. *M'Harg & Son*, 1923 S.C. 657; 31 & 32 Vict. c. 100, s. 34; see *Gilmour* v. *Hansen*, 1920 S.C. 597, at p. 606.

SUBSECTION (2).—*Procedure.*

1308. When the party against whom the verdict has been found intends to apply for a new trial in causes which have been tried at the sittings after the end of the session, or during the Christmas recess or at the Circuits, he must give notice of motion for a rule to shew cause why the verdict should not be set aside and a new trial granted, within six days after the commencement of the next session or of the meeting of the Court after the Christmas recess, or, if the cause has been tried during the session or immediately before the sitting down of the session, ten days after the trial of the cause.[1] The "February week" is in the same position as the Christmas recess.[2] The days referred to are ordinary days and not sederunt days.[3] The motion for a new trial is always made before the Division to which a cause belongs, and the appropriate procedure with reference to the giving notice of such a motion must be followed.[4] Such motions are considered as summary.[5] When the cause appears in the Summar Roll one counsel for the party moving is heard, and if a *prima facie* case is made out a rule is granted. Formerly when a rule was granted an order was made upon the trial judge to furnish his notes of the evidence.[6] It has now, however, become the almost invariable practice to have the evidence at a jury trial taken down in shorthand, and the shorthand writer's notes are certified by the judge as his notes of evidence.

1309. At the hearing on the rule counsel for the party holding the verdict is first heard, and afterwards counsel for the party who obtained the rule. If the party holding the verdict refuses to support it, it will be set aside.[7] If the judge who tried the cause is not one of the judges of the Division, such judge must be called in to the hearing on the rule, as also to the original motion for a rule.[8] Where the judges are equally divided in opinion the verdict stands.[9] In determining whether there is an equal division of opinion it is doubtful if the opinion of the trial judge, if he is not also a judge of the Division, can be taken into account.[10] Where owing to the difficulty and importance of a case the Division has appointed it to be argued before seven judges, the decision of the Court falls to be given in conformity with the opinions of the majority of the seven judges.[11]

SUBSECTION (3).—*Grounds for Setting Aside Verdict.*

(i) *Verdict Contrary to Evidence.*

1310. The Court will not set aside the verdict of a jury on this ground unless it is satisfied that the verdict is so flagrantly wrong that no

[1] C.A.S., F, iii. 5.
[2] *Cockburn* v. *Hogg*, 1897, 24 R. 529.
[3] *Campbell* v. *Caledonian Rly. Co.*, 1899, 2 F. 25.
[4] C.A.S., F, ii. 3, 6; *Campbell* v. *Caledonian Rly. Co.*, *supra.*
[5] C.A.S., F, iii. 7.
[6] A.S., 16th February 1841, s. 36.
[7] *M'Nair* v. *Corporation of Glasgow*, 1923 S.C. 397.
[8] 31 & 32 Vict. c. 100, s. 58.
[9] *Ibid.*, s. 61; *Bicket* v. *Wood*, 1893, 20 R. 874.
[10] *Park* v. *Wilsons & Clyde Coal Co.*, 1928 S.C. 121.
[11] 31 & 32 Vict. c. 100, s. 60; *Park* v. *Wilsons & Clyde Coal Co.*, *supra.*

reasonable jury discharging their duty honestly under proper direction would have given it.[1] Where a pursuer, by failing to cross-examine a defender's witnesses on a cardinal fact in the case, had in substance admitted that he had failed to prove that fact, a verdict in his favour was set aside as contrary to evidence.[2] So too where a defender in the witness-box admitted that an article for which he was responsible charged the pursuer with dishonest conduct, a verdict in his favour was set aside.[3] The Court will give great weight to the opinion of the judge who tried the case, but his opinion is not conclusive.[4]

(ii) *Excess or Inadequacy of Damages.*

1311. The question of the amount of damages is really for the jury, and the Court will not set aside their award as excessive unless the excess is such as to raise on the part of the Court the moral conviction that the jury, whether from wrong intention or incapacity or some mistake, have given higher damages than any jury of ordinary men, fairly and without gross mistake in exercising their functions, could have awarded.[5] Inadequacy of damages is also a ground for setting aside a verdict, but in that case the pursuer must shew that a new trial is essential to the justice of the case.[6]

(iii) *Res noviter veniens ad notitiam.*

1312. Where a party relies on *res noviter* he must not merely aver that something material has newly come to his knowledge, but he must aver this with such circumstantiality as will shew that he could not by the exercise of reasonable diligence have known of it in time to have made use of it in the original action. He must give particulars of its discovery, and of the circumstances which bear upon the possibility of his having acquired earlier knowledge of it.[7] Accordingly where a document had all along been in the possession of the agent of the party asking for a new trial, the new trial was refused.[8] Where the Court decides that the new evidence is material and that a new trial must be allowed it does not at all decide that the new evidence will either certainly or probably lead to a different verdict.[9] Where the new evidence is merely additional evidence of a fact originally averred and

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[1] *Ross* v. *M'Kittrick*, 1886, 14 R. 255, at p. 262; *Kinnell* v. *Peebles*, 1890, 17 R. 416, at p. 424; *Campbell* v. *Scottish Educational News Co., Ltd.*, 1906, 8 F. 691.

[2] *Keenan* v. *Scottish Wholesale Co-operative Society*, 1914 S.C. 959.

[3] *Ross* v. *M'Kittrick*, *supra*.

[4] *M'Culloch* v. *North British Bank*, 1849, 11 D. 1197; *Ross* v. *M'Kittrick*, *supra*.

[5] *Landell* v. *Landell*, 1841, 3 D. 819; *Casey* v. *United Collieries*, 1907 S.C. 690; *Thoms* v. *Caledonian Rly. Co.*, 1913 S.C. 804, at p. 809; *M'Kiernan* v. *Glasgow Corporation*, 1919 S.C. 407.

[6] *Reid* v. *Morton*, 1902, 4 F. 438; *Madden* v. *Glasgow Corporation*, 1923 S.C. 102.

[7] *M'Carroll* v. *M'Kinstery*, 1926 S.C. (H.L.) 1; see *Ross* v. *Ross*, 1928 S.C. 600.

[8] *Byers* v. *Forbes*, 1866, 4 M. 388.

[9] *Bannerman* v. *Scott*, 1846, 9 D. 163; but see *Miller* v. *Mac Fisheries*, 1922 S.C. 157, per Lord Cullen at p. 164.

supported by testimony at the trial, a new trial will not be granted.[1] An allegation of perjury against witnesses at a trial is not *res noviter*.[2]

(iv) *Such other Cause as is Essential to the Justice of the Case.*

1313. Under this head of the statute the Court has granted a new trial on the ground of surprise.[3] Thus where the verdict proceeded upon evidence led by the defender which supported a plea of contributory negligence on the part of the pursuer, which the defender had neither averred nor pleaded, it was set aside.[4] If, however, the evidence led for the pursuer discloses a case of contributory negligence, and the jury return a verdict for the defender, that verdict will not be set aside on the ground of surprise, even though contributory negligence has neither been averred nor pleaded.[5] Where evidence is allowed to support a case different from the case averred on record,[6] the Court will grant a new trial. A party must, however, be prepared for all the views that can be presented upon averments distinctly made.[7]

1314. Where a verdict is ambiguous,[8] or self-contradictory and irrational,[9] a new trial will be granted. It will also be granted where a litigant has obtained a verdict upon evidence adduced by him which is contradictory upon a vital part of his case.[10] In one case, where the Court was satisfied that the questions between the parties had not been fairly raised by the record, a new trial upon an amended record with new issues was allowed.[11]

1315. If in the course of a trial a juryman visits the *locus* of an accident, performs experiments to inform himself as to how the accident took place, and sees interested parties there, a new trial will be granted;[12] but if he merely walks over the *locus* the Court will not interfere with the verdict.[13] Nor will it do so merely because a juryman was one of 18,500 employees of one of the parties.[14] If a jury, instead of deliberating, cast lots for their verdict, it will be set aside,[15] but the Court will not allow jurors to be examined as to the character and result of their deliberations.[16] Accordingly a rule was refused where it was alleged that the votes of the jury had been wrongly counted,[17] or that they were under a misapprehension as to the effect of their verdict.[18]

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[1] *Miller* v. *Mac Fisheries*, 1922 S.C. 157. [2] *Snodgrass* v. *Hunter*, 1899, 2 F. 76.
[3] *Gye & Co.* v. *Hallam*, 1832, 10 S. 710. [4] *Crawford* v. *Lush's Trs.*, 1884, 12 R. 25.
[5] *Murray* v. *Middle Ward of Lanark Road Trs.*, 1888, 15 R. 737; *Shillinglaw* v. *J. G. & R. Turner*, 1925 S.C. 807.
[6] *Livingstone* v. *Strachan, Crerar & Jones*, 1923 S.C. 794; see *Littlejohn* v. *Brown & Co.*, 1909 S.C. 169.
[7] *Mackenzie* v. *Mags. of Fortrose*, 1842, 4 D. 911; *M'Aslan* v. *Glen*, 1859, 21 D. 511.
[8] *Florence* v. *Main*, 1890, 18 R. 247.
[9] *Stewart* v. *Caledonian Rly. Co.*, 1869, 42 Sc. Jur. 38; *Spreng* v. *Martin's Trs.*, 1910 S.C. 1087.
[10] *M'Ghee* v. *Glasgow Coal Co.*, 1923 S.C. 293. [11] *Gelot* v. *Stewart*, 1870, 8 M. 649.
[12] *Sutherland* v. *Prestongrange Colliery Co.*, 1885, 15 R. 494.
[13] *Hope* v. *Gemmell*, 1898, 1 F. 74. [14] *Watson* v. *North British Rly. Co.*, 1901, 3 F. 342.
[15] *Stewart* v. *Fraser*, 1830, 5 Murray 166.
[16] *Stewart* v. *Fraser*, *supra*; *Pirie* v. *Caledonian Rly. Co.*, 1890, 17 R. 1157.
[17] *Pirie* v. *Caledonian Rly. Co.*, *supra*. [18] *Fullerton* v. *Caledonian Rly. Co.*, 1882, 10 R. 70.

1316. It is not a ground for granting a new trial that counsel fails to examine his client as a witness,[1] or gives up the case contrary to his client's instructions.[2] Although, as already stated, an allegation that certain witnesses for the successful party have perjured themselves is not a ground for granting a new trial,[3] it has been granted where a letter had been admitted in evidence which must have borne a false date, as it was written on paper manufactured in patent moulds which were not invented for several years after the date.[4] Where a presiding judge uses his discretion with regard to allowing proof in replication,[5] or additional evidence,[6] unjustly, a new trial may be granted. And generally it will be granted when anything occurs in the conduct of the case before the jury which is inconsistent with the conditions of fair trial and displaces any reasonable confidence in the result arrived at.[7]

Subsection (4).—*Entering Judgment for Party Unsuccessful at Trial.*

1317. If, after hearing parties upon a rule to shew cause why a new trial should not be granted on the ground that the verdict is contrary to evidence, the Court are unanimously of opinion that the verdict under review is contrary to evidence, and, further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they are entitled to set aside the verdict and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial.[8]

Subsection (5).—*Appeal to House of Lords.*

1318. On a motion for a new trial an interlocutor granting or refusing a new trial is not subject to review by appeal to the House of Lords, even when the ground of the motion has been an exception taken at the trial to the ruling of the presiding judge.[9]

Section 15.—Bill of Exceptions.

Subsection (1).—*General Procedure.*

1319. It is competent to the counsel for any party at the trial of any issue or issues to except to the opinions and directions of the presiding judge either as to the competency of witnesses, the admissibility of

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[1] *Mackintosh* v. *Fraser*, 1860, 22 D. 421.
[2] *Currie* v. *Glen*, 1846, 9 D. 308.
[3] *Snodgrass* v. *Hunter*, 1899, 2 F. 76.
[4] *Millar* v. *Fraser*, 1826, 4 Murray 112, at p. 118.
[5] *Rankine* v. *Roberts*, 1873, 1 R. 225.
[6] *Christie* v. *Thompson*, 1859, 21 D. 337, at p. 351.
[7] *Reekie* v. *M'Kinven*, 1921 S.C. 733.
[8] *Mills* v. *Kelvin & James White, Ltd.*, 1913 S.C. 521; *Macleod* v. *Edinburgh and District Tramways Co.*, 1913 S.C. 624; *West* v. *Mackenzie*, 1917 S.C. 513; 10 Edw. VII. & 1 Geo. V. c. 31, s. 2.
[9] *Bicket* v. *Wood*, 1893, 20 R. 874; *Mitchell* v. *M'Harg & Son*, 1923 S.C. 657, but see per Lord Anderson at p. 670.

evidence, or other matter of law arising at the trial.[1] Where exception is taken to points of law laid down by the presiding judge in the course of a trial or in his charge to the jury, the counsel tendering such exception must deliver in a note thereof to the judge at the time the exception is taken, and if this note states correctly what was decided or directed, or omitted by the judge to be directed, it must be certified by the judge at the time by subscribing his name to it, and a note of all exceptions taken in the course of a trial or to the charge of the judge must be finally settled and certified by the signature of the judge before the jury is enclosed to consider their verdict.[2] In practice, where an exception is taken to the admission or rejection of evidence as distinct from an exception to the judge's charge, this is noted by the shorthand writer, who is now almost invariably employed to take the evidence in jury trials, under direction of the judge.

1320. Where a party intends to insist on the exceptions taken by him at the trial, he must lodge a bill of exceptions within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, if the cause has been tried after the end of the session at the sittings in March or July, or during the Christmas recess or upon Circuit, or within ten days if the case has been tried during the session or immediately before the sitting down of the session.[3] The Court may, however, prolong the period for presenting the bill.[3] The bill must contain a distinct statement of the exception or exceptions noted or signed by the judge at the trial,[4] with such a statement of the circumstances in which the exception or exceptions were taken [5] (including, if necessary, a statement of the purport of the evidence, or extracts therefrom, so far as bearing upon such exception or exceptions, but without any argument) as, along with the record in the cause may enable the Court to judge of such exception or exceptions.[6] Unless the party excepting chooses, or the judge at the trial or the Court at the discussion of the bill so directs, it is unnecessary to print or submit to the Court the notes of evidence or the documentary evidence adduced at the trial. When the notes and documents are submitted to the Court they form no part of the bill of exceptions. In discussing a bill of exceptions it is competent for either party to refer to the record, and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time.[6]

1321. At one time it was the practice for the judge to have a conference with counsel before adjusting and signing a disputed bill of exceptions, but that practice seems to have fallen into desuetude. It has recently been suggested that it might advantageously be revived.[7]

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[1] 55 Geo. III. c. 42, s. 7. [2] 31 & 32 Vict. c. 100, s. 34; C.A.S., F, ii. 7.
[3] C.A.S., F, iii. 6. [4] *Wilson* v. *Dick's Co-operative Institutions*, 1916 S.C. 578.
[5] *Connelly* v. *Clyde Navigation Trs.*, 1902, 5 F. 8; *Glass* v. *Paisley Race Committee*, 1902, 5 F. 14. [6] 31 & 32 Vict. c. 100, s. 35.
[7] *Park* v. *Wilsons & Clyde Coal Co.*, 1927 S.C. 299, per Lord Justice-Clerk Alness.

After a bill has been adjusted at the sight of the judge it is signed by him. It is irregular for him in the bill of exceptions to make any alteration in the note of exceptions signed by him at the trial.[1] The bill may be signed by the presiding judge, though in the interval he has resigned office.[2] Where the presiding judge died before signing the bill the Court remitted to another judge to adjust and sign the bill.[3]

1322. If a party has both lodged a bill of exceptions and given notice of a motion for a new trial in the same cause the Court has both before them at the discussion on the bill of exceptions, so that both may be disposed of at the same time if that is considered necessary or expedient.[4]

Subsection (2).—*Grounds of Bill of Exceptions.*

(i) *Competency of Witnesses.*

1323. At one time the rules of evidence placed disabilities on many classes of persons as witnesses. These, however, have now all been removed, and objection to the competency of a witness, as distinguished from the nature of the evidence which he might give, has practically disappeared.

(ii) *Admissibility of Evidence.*

1324. A bill of exceptions is not allowed upon the ground of the undue admission of evidence if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict from that actually pronounced, and it is not imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence when it appears from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived.[5] Where documentary evidence improperly rejected referred only to two out of three issues before the jury and had no bearing upon the third issue, and where the defenders contended that the new trial should be confined to the two issues in respect of which the evidence had been improperly rejected, the Court allowed a new trial on all the issues.[6] When incompetent evidence has been allowed, it is difficult to persuade the Court that its exclusion could not have led to a different verdict than that actually pronounced.[7]

1325. The exercise by a judge of his discretion in allowing proof in replication,[8] or additional evidence,[9] is not a question of law, and cannot be made the subject of a bill of exceptions. In appropriate cases an unjust exercise of judicial discretion might, however, be brought

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[1] *Glasgow* v. *Hurlet Alum Co.*, 1850, 7 Bell's App. 100.
[2] *Smith* v. *Mackay*, 1835, 13 S. 323.
[3] *Shepherd* v. *Gibson's Trs.*, 1869, 8 M. 31.
[4] C.A.S., F, iii. 6; see *Gilmour* v. *Hansen*, 1920 S.C. 598.
[5] 13 & 14 Vict. c. 36, s. 45.
[6] *Cameron* v. *Cameron's Trs.*, 1850, 13 D. 412.
[7] See *Gilmour* v. *Hansen*, 1920 S.C. 598; *Livingstone* v. *Strachan, Crerar & Jones*, 1923 S.C. 794.
[8] *Rankine* v. *Roberts*, 1873, 1 R. 225.
[9] *Christie* v. *Thompson*, 1859, 21 D. 337, at p. 351.

before the Court in the form of a motion for a rule to shew cause why a new trial should not be granted.[1]

(iii) *Other Matter of Law arising at Trial.*

1326. Unless in so far as one or other of the parties distinctly points out to the judge something done wrong or something omitted, and asks him to lay down correctly that which he either has not laid down at all or laid down incorrectly, the law presumes that he has previously told the jury all that he ought to have told them.[2] To ask the judge after he has given the proper charge applicable to the circumstances to lay down an abstract proposition of law is hazardous, and may mislead the jury.[2] When he is asked to do so, he is entitled to consider not only its soundness, but whether it is right and proper that such a direction should be given to the jury in the particular case before him.[3]

1327. The direction which a judge is asked to give must be a direction in law.[4] It must be framed with such precision and accuracy that the judge can give it in the very terms proposed, otherwise he is not bound or entitled to lay it down at all.[5] The direction asked must not be ambiguous,[6] and it must be of the essence of the case.[7] Where exception is taken to the law laid down to the jury it must be made clear what was the law laid down that was objected to,[8] and the bill of exceptions would require to state both the law which was objected to and the law which the party excepting maintains should have been stated.[8] If a direction in law of a judge is ambiguous, a bill of exceptions will be allowed.[9] It is not necessary to shew that the direction deceived the jury, it is sufficient if it was calculated to do so.[10]

1328. The refusal of a judge at the close of a pursuer's case to direct the jury to return a verdict for the defender cannot be made the ground of a bill of exceptions.[11] If, however, he does so direct the jury, and the pursuer at the time objects to the direction and asks the judge to note it, the objection may be followed up either by a bill of exceptions or by a motion for a new trial.[12]

1329. The decision upon a bill of exceptions is given in conformity with the opinion of the majority of the judges present at the hearing.[13] If there is an equal division of opinion the verdict stands.[14] According

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[1] *Rankine* v. *Roberts*, 1873, 1 R. 225, at p. 229.

[2] *Hogg* v. *Campbell*, 1865, 3 M. 1018; *M'Kibbin* v. *Glasgow Corporation*, 1920 S.C. 590.

[3] *Wood* v. *North British Rly. Co.*, 1899, 2 F. 1.

[4] *M'Dougall* v. *Girdwood*, 1867, 5 M. 937; *Woods* v. *Caledonian Rly. Co.*, 1886, 13 R. 1118.

[5] *Addie* v. *Western Bank*, 1865, 3 M. 899, at p. 909.

[6] *Callaghan* v. *Monkland Iron Co.*, 1856, 19 D. 52, at p. 54.

[7] *Keeney* v. *Stewart*, 1909 S.C. 754, at p. 758.

[8] *Baird* v. *Reilly*, 1856, 18 D. 734.

[9] *Wilson* v. *Sneddons*, 1866, 4 M. 736; *Fraser* v. *Younger & Sons*, 1867, 5 M. 861.

[10] *Fraser* v. *Younger & Sons*, *supra*; *Cleland* v. *Weir*, 1847, 6 Bell's App. 70.

[11] *Keeney* v. *Stewart*, 1909 S.C. 754.

[12] *Mitchell* v. *M'Harg & Son*, 1923 S.C. 657.

[13] 31 & 32 Vict. c. 100, ss. 60, 61; *Bicket* v. *Wood*, 1893, 20 R. 874; *Park* v. *Wilsons & Clyde Coal Co.*, 1928 S.C. 121.

[14] 31 & 32 Vict. c. 100, s. 61.

to this rule the trial judge, if he is not also a member of the Division of the Court before which the bill of exceptions comes, has a vote along with the judges of the Division.

Subsection (3).—*Appeal to House of Lords.*

1330. The judgment of the Division upon a bill of exceptions, differing from its judgment upon a motion for a new trial,[1] may be appealed to the House of Lords.[2]

Section 16.—Appeal for Jury Trial.

See Appeal (Civil), Vol. I. p. 401, *ante.*

Section 17.—Trial of Civil Causes by Jury at Circuit.

1331. After issues have been adjusted it is competent to apply to the Court to have the case tried at Circuit.[3] If the application is granted the trial is presided over by one of the judges attending the Circuit.[4] The jury is chosen from the list of jurors summoned to attend the Circuit Court of Justiciary. It is doubtful whether it is competent to hold a civil jury trial on circuit where there is no criminal business,[5] and it is incompetent to hold one at the Christmas Circuit at Glasgow.[6] For many years applications for a civil jury trial at a circuit town have been very rare, and they have been still more rarely granted.[7] The trial can only take place at a Circuit having criminal jurisdiction over the place to which the action belongs.[8]

Section 18.—Jury Trial in the Sheriff Court.

Subsection (1).—*Criminal Jury Trial.*

1332. When a person is to be tried by jury in the Sheriff Court he is served with an indictment setting forth the charge against him and containing a notice requiring him to appear in the Sheriff Court for the first diet under the indictment at a date which must not be less than six clear days after the service of the indictment, and for the second diet at a date which must not be less than nine clear days after the first diet.[9] If the accused person pleads guilty at the first diet he is sentenced, and the case takes end. If, however, he pleads not guilty, a jury is empanelled and he is tried at the second diet. The procedure at the

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[1] 55 Geo. III. c. 42, s. 6. [2] *Ibid.*, s. 7. [3] *Ibid.*, s. 15.
[4] 31 & 32 Vict. c. 100, s. 46. [5] *Malcolm* v. *Lloyd*, 1885, 12 R. 843.
[6] *Campbell* v. *Caledonian Rly. Co.*, 1881, 9 R. 251.
[7] *Cunningham* v. *Speirs & Co.*, 1866, 2 S.L.R. 206; *Fraser* v. *Macnee*, 1868, 5 S.L.R. 365; *Macpherson* v. *Caledonian Rly. Co.*, 1881, 8 R. 901; *Rankin* v. *Campbell*, 1881, 9 R. 166; *M'Gregor* v. *Caledonian Rly. Co.*, 1882, 9 R. 659; *Thorburn* v. *Caledonian Rly. Co.*, 1882, 19 S.L.R. 631; *Mackay* v. *North British Rly. Co.*, 1885, 22 S.L.R. 775; *Lang* v. *Hay*, 1905, 42 S.L.R. 464.
[8] *Mackintosh* v. *Moir*, 1871, 9 M. 698. [9] 50 & 51 Vict. c. 35, s. 25.

second diet in the Sheriff Court is in all respects the same as in a trial in the High Court of Justiciary.[1] See CRIME (PROCEDURE).[2]

SUBSECTION (2).—*Civil Jury Trial.*

1333. In any action raised by an employee against his employer for damages under the Employers' Liability Act, 1880, or at common law, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds £50 either party may, so soon as proof has been allowed or within six days thereafter, require that the cause shall be tried before a jury, in which case the Sheriff must appoint the action to be tried before a jury of seven jurors.[3] The jury consists of two special and five common jurors who are chosen from a panel of five special and ten common jurors cited for the diet.[4] The statutory and other regulations relating to the qualification, citation, non-attendance, selection, and swearing of jurors are the same for a jury trial in the Sheriff Court as in the Court of Session,[5] except that in the Sheriff Court each party has a right to challenge without cause assigned only one special and one common juror, and where there are more pursuers or defenders than one, in the matter of challenging jurors, they must act collectively.[6]

1334. The procedure up to the allowance of proof is the same in a jury trial as in an ordinary Sheriff Court action. When proof has been allowed the Sheriff must fix a time and place for the trial not sooner than fourteen days from the date of the interlocutor fixing the proof.[7] Any documents or productions intended to be put in evidence or referred to at the trial must be lodged with the clerk of Court five days before the date fixed for the trial, but the Sheriff may allow them to be produced at the trial if he is satisfied that they could not reasonably have been lodged earlier and that reasonable notice had been given to the other parties of the intention to produce them at the trial.[8]

1335. The evidence led at the trial must be taken down in shorthand unless all the parties put in a minute dispensing with a record of the proceedings.[9] Where no shorthand notes of the proceedings have been taken the interlocutor applying the verdict is not subject to review.[10] Where the evidence is being taken down in shorthand and exception is taken in the course of the trial to rulings of the Sheriff in regard to admission or rejection of evidence, or in regard to points of law laid down in the course of the trial or in the Sheriff's charge to the jury, these exceptions must, if the party taking them so requires, be recorded

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[1] 50 & 51 Vict. c. 35, s. 40.
[2] Vol. V. p. 241, *ante*.
[3] 7 Edw. VII. c. 51, s. 31; 2 & 3 Geo. V. c. 28, s. 3.
[4] 7 Edw. VII. c. 51, Sched. I., Rule 133.
[5] *Ibid.*, Rule 134.
[6] *Ibid.*, Rule 135.
[7] 2 & 3 Geo. V. c. 28, s. 6.
[8] 7 Edw. VII. c. 51, Sched. I., Rule 142.
[9] *Ibid.*, Rule 137.
[10] *Ibid.*, Rule 147; *Adair* v. *Colville & Sons*, 1922 S.C. 672.

to the Sheriff's dictation upon the official shorthand notes before the jury proceed to consider their verdict.[1]

1336. If the Sheriff considers it necessary to charge the jury, he does so after the conclusion of the evidence and the speeches for the parties.[2] At the same time he may, and if required by either party he must, propone to the jury a question or questions of fact to be answered by them.[3] If he does so, the jury must in their verdict give specific answers to such question or questions.[3] If he propones to the jury questions which *per se* do not bring out the true case, and then fails to give the proper directions in law, that would be a misdirection to the jury to which exception could be taken.[4] As the putting of specific questions by the Sheriff is no longer imperative unless the parties require it, it has been suggested that the Sheriff would be well advised to put the case before the jury in the form of a general issue. He is not entitled to obtain from them both a general and a special verdict.[5]

1337. The jury may return a verdict by a majority of its members at any time not less than one hour after it has been enclosed.[6] The verdict is then recorded upon the interlocutor sheets and signed by the clerk of Court.[7] As soon as the verdict has been so recorded, or within fourteen days thereafter, any party in the cause may move the Sheriff to apply the verdict. In the interlocutor applying the verdict the Sheriff must dispose of the question of expenses.[8]

1338. If shorthand notes of the evidence have been taken, it is competent for any party in the cause, within fourteen days after the date of the final interlocutor of the Sheriff applying the verdict (but not later), to appeal to a Division of the Court of Session.[9] The grounds upon which such an appeal may be taken are (1) that the verdict has been erroneously applied by the Sheriff; (2) that the verdict is contrary to the evidence; (3) that the Sheriff had in the course of the trial unduly refused or admitted evidence, or misdirected the jury; and (4) that an award of damages is inadequate or is excessive. There have been few appeals since civil jury trial was introduced into the Sheriff Court, and such as there are have for the most part related to provisions in the Sheriff Court Act of 1907 which have either been amended or made clear by the subsequent Act of 1913. The grounds of appeal, however, are very largely the same as those upon which appeal against the verdict of a jury can be taken in the Court of Session, and the references given when dealing with that subject may be usefully consulted.

1339. After hearing the appeal the Court may refuse it or may find that the verdict was erroneously applied and give judgment accordingly, or they may set aside the verdict and order a new trial. If the judges are equally divided in opinion the verdict must stand.[9] Where

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[1] 7 Edw. VII. c. 51, Sched. I., Rule 139. [2] *Ibid.*, Rule 141.
[3] 2 & 3 Geo. V. c. 28, s. 6. [4] *Adair* v. *Colville & Sons*, 1926 S.C. (H.L.) 51, at pp. 56, 57.
[5] *Ferguson* v. *North British Rly. Co.*, 1915 S.C. 566, at p. 584; *Adair* v. *Colville & Sons*, 1926 S.C. (H.L.) 51, at p. 57.
[6] 7 Edw. VII. c. 51, Sched. I., Rule 143. [7] *Ibid.*, Rule 145. [8] *Ibid.*, Rule 146.
[9] 7 Edw. VII. c. 51, s. 31; *Forsyth* v. *Plean Colliery Co.*, 1925 S.C. 76.

the verdict is set aside as being contrary to evidence the Court, if they are unanimous, and if they are further of opinion that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, may, in place of granting a new trial, enter judgment for the party unsuccessful at the trial.[1] Even where a verdict is not open to attack on any of the statutory grounds, it may, in exceptional cases, be set aside by way of reduction where there has been a fundamental miscarriage of justice.[2]

Section 19.—Fatal Accidents and Sudden Deaths.

1340. When the death takes place of any person or persons, whether employers or employed, engaged in any industrial employment or occupation, due or reasonably believed to be due to accident occurring in the course of that employment or occupation, an inquiry must be held before a Sheriff and jury.[3] This inquiry is not a trial either of a criminal or of a civil nature, for although the jury are entitled to state the names of the person or persons, if any, to whose fault or negligence the accident is attributable,[4] the Sheriff is not entitled to pass any sentence against such person or persons, nor are the jury entitled to award damages. The jury consists of five common and two special jurors, and no challenges are allowed.[5] In any case of sudden or suspicious death in Scotland the Lord Advocate may, whenever it appears to him to be expedient in the public interest, direct that a public inquiry into such death and the circumstances thereof shall be held.[6] The procedure is the same as that in an inquiry in connection with a death in an industrial employment.[6] See Accident.[7]

Section 20.—Lands Clauses Consolidation (Scotland) Act.

1341. Any person entitled to compensation exceeding £50 under this Act may have the amount of the compensation settled either by a special [8] or by a common jury.[9] The jury consists of thirteen persons,[10] but the method of selecting them differs in the two cases.[10] The inquiry is presided over by the Sheriff.[11]

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[1] 10 Edw. VII. & 1 Geo. V. c. 31, s. 2.
[2] *Adair* v. *Colville & Sons*, 1924 S.C. 981; 1926 S.C. (H.L.) 51.
[3] 58 & 59 Vict. c. 36.
[4] 6 Edw. VII. c. 35, s. 2.
[5] 58 & 59 Vict. c. 36, s. 4 (5) (6).
[6] 6 Edw. VII. c. 35, s. 3.
[7] Vol. I. p. 35, *ante*.
[8] 8 & 9 Vict. c. 19, s. 53.
[9] *Ibid.*, s. 66.
[10] *Ibid.*, ss. 41, 53, 54.
[11] See Compulsory Purchase, Vol. IV. p. 275, *ante*.

JUS.

See LAW.

JUS ACCRESCENDI.

See ACCRETION.

JUS CREDITI.

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Section 1.—Introductory.

1342. In a wide sense this term may be applied to the right which is vested in the creditor in any personal obligation, and which may be enforced by personal action. It has been used to describe such widely differing rights as those of partners in private or public companies, and of heirs under marriage contracts, entails, and trust deeds. In this sense it is equivalent to *jus ad rem* and covers the whole range of obligation, and is distinguished, on the one hand, from a mere *spes*, which confers no *jus* whatever, and, on the other hand, from a real right or *jus in re*, which founds a preferential right.[1] The term *jus crediti*, however, is now generally understood in a more restricted sense as descriptive of the rights conferred under contracts of marriage, or deeds of a like nature for settling provisions upon wives and children of a marriage. It is in this restricted sense that the subject is here more particularly treated.

Section 2.—Creation and Essentials of a proper Jus crediti.

1343. To the creation of a *jus crediti* in the proper sense of the term there are two essential factors which must be carefully distinguished.

General Authorities.—Bell, Com., M'Laren's ed., i. 681 *et seq.*; Ersk. iii. 8, 38 *et seq.*; Fraser on Husband and Wife, 3rd ed., ii. 1347 *et seq.*, 1356, 1407 *et seq.*, 1475, 1498; Goudy on Bankruptcy, 4th ed., pp. 26 *et seq.*, 293; Bell, Convey. ii. 861, 873, 878, 893 *et seq.*; Menzies, Convey., pp. 384 *et seq.*, 655 *et seq.*

[1] In *Edmond* v. *Gordon*, 1857, 3 Macq. 116, at pp. 122 and 129, a distinction is suggested between *jus ad rem* and *jus crediti*. It is thought that such a distinction is unfounded.

Not only must a present right be stated in the creditor, but that right must avail in competition with onerous creditors. For a *jus crediti* is "a right which entitles the parties vested with it to compete with onerous creditors on a deficient fund." [1] Any right which falls short of this is not a true *jus crediti*; any right which has a higher effect, and which confers a preference upon the holder, is no longer a *jus crediti* but a real right.

SUBSECTION (1).—*Right of Creditor.*

1344. While a present right must be stated in the creditor, it need not be presently exigible. For an obligation to pay or deliver at a future date will create a present right in the creditor, vesting in him from the date of the obligation. It is a question of construction in each case whether or not a present right effectual against the granter and his representatives has been conferred, having regard primarily to the intention of parties as expressed in the deed granting the right.

SUBSECTION (2).—*Right as against Creditors of the Granter.*

1345. As has been stated, the right conferred must also be effectual against creditors of the granter. It is solely in this connection that considerations of onerosity in the grant or of solvency in the granter become relevant, as defending the right against challenge by creditors either at common law or under the statutes relating to insolvency and bankruptcy.

SECTION 3.—PROVISIONS IN FAVOUR OF A WIFE.

SUBSECTION (1).—*In Antenuptial Contracts of Marriage.*

1346. Under the ordinary forms of antenuptial contracts the wife has a *jus crediti* for her provisions. She receives the character and rights of a creditor of her husband, and ranks *pari passu* with other creditors absolutely after his death, and contingently upon her survivance during his life.[2] But she has, *qua* wife, no preference beyond what she may establish by diligence.[3] Where provisions in favour of a wife are of a testamentary nature, the fact that they are contained in an antenuptial contract will not confer a *jus crediti* upon her.[4] In a question with creditors, however, provisions to a wife, even if contained in an antenuptial contract, may not avail; for, although the husband's insolvency is not here a relevant plea [5] (in the absence of anything of the nature of fraud),[6] the onerous consideration of the marriage fails

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[1] *Wilson's Trs.* v. *Pagan or Wilson*, 1856, 18 D. 1096, per Lord Benholme at p. 1104.

[2] Ersk. iii. 9, 22; iii. 8, 36, note (*d*); *Wilson's Trs.* v. *Pagan or Wilson*, *supra*; Menzies, Convey., p. 385.

[3] *Keith* v. *Keith*, 1688, Mor. 11833; *Allan, Relict of James Cleghorn* v. *His Crs.*, 1713, Mor. 11835; Bell, Com., M'Laren's ed., i. 683.

[4] See *Grant* v. *Robertson*, 1872, 10 M. 804, per Lord Benholme at p. 809.

[5] Ersk. iv. 1, 33; *Thoirs' Crs.* v. *Middleton*, 1729, Mor. 984.

[6] *Wood* v. *Reid*, 1680, Mor. 977; *Watson* v. *Grant's Trs.*, 1874, 1 R. 882, per Lord Ormidale at p. 887.

in so far as the provisions exceed what is fair and reasonable.[1] But the excess must be gross. "We are not to measure the rationality in nice scales." [2]

Subsection (2).—*In Postnuptial Contracts of Marriage.*

1347. In the case of marriage contracts or other deeds which are executed after marriage, the highly onerous cause which supports antenuptial provisions in a question with creditors is awanting, the parties being no longer independent contractors. For such provisions, therefore, a wife has no *jus crediti* unless the husband was solvent at the date of granting them, and then only to a reasonable amount.[3] Erskine's statement [4] that postnuptial provisions to a wife, so far as rational and without fraud, may be sustained, albeit the husband were at the date of granting them conscious of insolvency, is not now the law. The insolvency of the husband is a relevant answer against her claim to rank to any extent. But a conveyance to a wife *stante matrimonio*, granted in fulfilment of an unobjectionable obligation in an antenuptial contract, is, of course, effectual to her as being granted for an onerous cause.[5] Postnuptial provisions, however, which remove restrictions upon or vary in her favour the wife's antenuptial provisions, confer upon her no *jus crediti* so as to compete with onerous creditors.[6]

Section 4.—Provisions in Favour of Children.

Subsection (1).—*Where no proper* Jus crediti *is Conferred.*

1348. In the case of provisions to children and heirs of the marriage, there is a presumption against an intention by the father to confer upon them a present right of credit, so as to clothe them during his life with the character and rights of true creditors.[7] Under the ordinary styles of contracts, therefore, the right of the issue of the marriage is a mere *spes successionis*, defeasible, however, only by the father's onerous deeds. Where no actual benefit or interest can be claimed or taken in the father's lifetime, there is no *jus crediti* vested in the children as against onerous creditors of the father.[8] Accordingly, where heritage is provided, or a sum of money made payable to the heirs or children of the marriage at or after the father's death, whether by antenuptial

[1] *Duncan* v. *Sloss*, 1785, Mor. 987; *M'Lachlan* v. *Campbell*, 1824, 3 S. 192.

[2] *Carphin* v. *Clapperton*, 1867, 5 M. 797, per Lord Neaves at p. 804.

[3] *Jeffrey* v. *Campbell*, 1825, 4 S. 32; *Sharp* v. *Christie*, 1839, 1 D. 396; *Craig* v. *Galloway*, 1861, 4 Macq. 267; *Walkinshaw's Trs.* v. *Walkinshaw*, 1872, 10 M. 763; see also *Guthrie* v. *Bell*, 1846, 9 D. 124.

[4] Ersk. iv. 1, 33; and see *Walker* v. *Polwarth*, 1635, Mor. 953.

[5] *Campbell* v. *Somerville*, 1778, Mor. 1000.

[6] *M'Lachlan* v. *Jaffrey*, 1839, 1 D. 1177; Fraser, Husband and Wife, 2nd ed., ii. 1347 *et seq.*; Bell, Com., M'Laren's ed., i. 683, 687; Stair, Inst., by Brodie, 98 n.; Menzies, Convey., p. 406.

[7] *Gordon* v. *Sutherland*, 1748, Mor. 12915; affd. 1 Pat. 493; *Herries Farquhar & Co.* v. *Brown*, 1838, 16 S. 948, at p. 964.

[8] *Goddard* v. *Stewart's Children*, 1844, 6 D. 1018, per Lord Moncreiff at p. 1024.

contract,[1] by postnuptial contract,[2] or by bond of provision,[3] no *jus crediti* is thereby conferred upon them to the effect of enabling them to compete with onerous creditors, even as to debts contracted after the marriage.[4] And where the deed does not confer a *jus crediti* the character of the right will not be changed by the adjection of a clause giving a right of action, or authorising diligence at the instance of the children or persons named for the purpose,[5] or obliging the granter to grant infeftment in terms of the contract,[6] or to secure the children's provisions,[7] or by an express clause of warrandice.[8] Even where infeftment has been taken in security of the children's provisions, the security, being merely accessory, has been held not to alter the character of the principal obligation.[9] Infeftment taken in security may, however, become important in a question *inter heredes*, for it will there confer a preference to the extent of the subject secured.[10]

Subsection (2).—*Where a* Jus crediti *is Conferred.*

1349. Where, on the other hand, a provision to children is so conceived that there may be a direct interest accruing during the father's lifetime, this will be in general construed as conferring a *jus crediti*.[11] If, for example, there is an obligation to infeft the heir at a determinate day or age,[12] or where a provision is made payable on the majority or marriage of the child,[13] or at the dissolution of the marriage,[14] a *jus crediti* is conferred. If the provision is to bear interest from a term which may arrive during the father's life, this will confer a *jus crediti*, not only to the extent of the interest, but also for the principal sum, though the latter may not be payable till the father's death.[15] The

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[1] *Brown* v. *Govan*, 1st February 1820, F.C.; *Browning* v. *Hamilton*, 1837, 15 S. 999; *Goddard* v. *Stewart's Children*, 1844, 6 D. 1018; *Arthur* v. *Seymour & Lamb*, 1870, 8 M. 928; *Gillon's Trs.* v. *Gillon*, 1890, 17 R. 435, per Lord Rutherfurd Clark at p. 441.

[2] *Strachan* v. *Strachan*, 1754, Mor. 996.

[3] *Geddes* v. *Waddell*, 1836, 14 S. 1084.

[4] *Grahame* v. *Rome*, 1677, Mor. 12887.

[5] *Goddard*, *supra*, per Lord Medwyn at p. 1023; *Wilson's Trs.* v. *Pagan or Wilson*, 1856, 18 D. 1096, at pp. 1115, 1117, 1128.

[6] *Cunynghame* v. *Cunynghame*, 1804, Mor. 13029.

[7] *Arthur* v. *Seymour & Lamb*, *supra*; *Herries Farquhar & Co.* v. *Brown*, 1838, 16 S. 948, per Lord Mackenzie at p. 972.

[8] *Fulton* v. *King*, 1811, Hume 533; *Cunninghame* v. *Cunninghame*, 20th December 1810, F.C.

[9] *Brown* v. *Govan*, *supra*; *Goddard*, *supra*, per Lord Moncreiff at p. 1025; cp. *Bushby* v. *Renny*, 1825, 4 S. 110, and *Herries Farquhar & Co.* v. *Brown*, *supra*; Bell, Convey. ii. 895.

[10] *Herries Farquhar & Co.* v. *Brown*, *supra*, per Lord Medwyn at p. 972; *Wilson's Trs.* v. *Pagan or Wilson*, *supra*, per Lord Benholme at p. 1105; *Walkinshaw's Trs.* v. *Walkinshaw*, 1872, 10 M. 763.

[11] *Goddard* v. *Stewart's Children*, 1844, 6 D. 1018, per Lord Moncreiff at p. 1025.

[12] *Douglas* v. *Douglas and Drummond*, 1724, Mor. 12910.

[13] *Ballingall* v. *Henderson*, 1759, Mor. 12919; *Lyon* v. *Crs. of Easter Ogle*, 1724, Mor. 8150, 12909; *Cruikshank's Trs.* v. *Cruikshank*, 1853, 16 D. 7; see also *Jolly* v. *Grahame*, 1824, 2 S. 730.

[14] Menzies, Convey., p. 387.

[15] *Crs. of Kenneth Mackenzie* v. *His Children*, 1792, Mor. 12924; affd. 3 Pat. 409, 417; *Herries Farquhar & Co.* v. *Brown*, *supra*, at p. 967.

payment must not, however, be subject to any condition or contingency.[1] So, where provisions to younger children, although declared payable at majority or marriage, were contingent (as to amount) upon the father's estate devolving at his death upon children of a first or a subsequent marriage, the younger children's right to a *jus crediti* was negatived.[2] If no date for payment be expressed (as in a bond of provision) the obligation will *in dubio* be held to confer no present right.[3]

1350. Upon the same principle, if there be a clear intention to restrict the father's control over the property during his life in favour of the issue of the marriage, as for example in a clause restricting his right to a bare liferent, or imposing an obligation to denude in favour of trustees, or to entail the lands,[4] a *jus crediti* will be held to have been constituted thereby in the children, entitling them to compete with onerous creditors.[5] Even where the terms of the deed might not *per se* confer a *jus crediti*, security for the provisions by the infeftment of trustees for the children may overcome the presumption against a *jus crediti* having been constituted.[6] The intervention of trustees may in such cases operate so as to secure a preference if the trustees be infeft in the case of heritage,[7] or, in the case of moveables, if the money be invested in the names of trustees for behoof of the issue.[8] Where the intention is clear to vest the fee in the children, but their right has not been perfected by infeftment taken, diligence done, or assignation intimated, the children, although losing their preference, are still entitled, in virtue of their personal right to the fee, and of the *jus crediti* thereby created, to rank along with onerous creditors.[9]

Subsection (3).—*In Postnuptial Contracts or Bonds of Provision.*

1351. In questions with creditors, provisions in postnuptial contracts, or bonds of provision to existing children, are accounted gratuitous, and can be cut down in competition if the granter were not solvent.[10] Provisions to children of a first marriage contained in an antenuptial contract with a second wife are in no better position.[11] Where postnuptial provisions are made in implement of antenuptial obligations, the latter must, in order to found a true, just, and necessary cause for the later deed, have vested something more than a mere *spes* in the

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[1] Menzies, Convey., p. 387.

[2] *Mactavish* v. *His Crs.*, 1787, Mor. 12922; but cp. *Ballingall* v. *Henderson*, 1759, Mor. 12919.

[3] Menzies, Convey., p. 409.

[4] *Wilson's Trs.* v. *Pagan or Wilson*, 1856, 18 D. 1096, per Lord Neaves at p. 1109; *Herries Farquhar & Co.* v. *Brown*, 1838, 16 S. 948.

[5] Ersk. iii. 8, 40; Bell, Com., M'Laren's ed., i. 686; Menzies, Convey., p. 388.

[6] *Herries Farquhar & Co.* v. *Brown*, *supra*.

[7] *Bushby* v. *Renny*, 1825, 4 S. 110.

[8] See *Wilson's Trs.* v. *Pagan or Wilson*, 1856, 18 D. 1096.

[9] *Seton* v. *Crs. of Hugh Seton*, 1793, Mor. 4219; *Falconer* v. *Wright*, 1824, 2 S. 633; 1825, 3 S. 455; see *Guthrie* v. *Cowan*, 1846, 9 D. 124.

[10] *Murray-Kynnynmound's Crs.* v. *Murray-Kynnynmound*, 1746, Mor. 990; *Crs. of Cult* v. *His Younger Children*, 1783, Mor. 974.

[11] *Harvie* v. *Wink*, 1847, 9 D. 1420.

child.[1] Further, even where a *jus crediti* is conferred by the older deed, a postnuptial provision in implement will be exposed to challenge under the bankruptcy statutes if it vary the obligation in favour of the child.[2]

Section 5.—Reserved Powers of Husband or Father in Questions with Wife or Children.

1352. The husband's obligation in favour of the wife or children of the marriage, although it may prove ineffectual in competition with his creditors, is, in a question with him or his representatives, fully onerous and binding. He is, accordingly, under an implied obligation not to defeat the rights created in their favour by any subsequent gratuitous deed, and is barred from disputing their right to claim as creditors. This holds good whether the effect of the father's obligation be to confer a full *jus crediti* or a mere *spes successionis*. In either case his power to grant onerous deeds remains untouched; in either case the wife or children of the marriage can *qua* creditors challenge and reduce gratuitous deeds granted by him subsequent to and in prejudice of his obligation to them.[3] Thus, he may sell the estate destined to the heirs of the marriage.[4] Again, he can settle provisions, by marriage contract or otherwise, on the wife or children of a second marriage,[5] or upon the younger children on their marriage,[6] even though these may entail encroachment upon provisions settled under a former marriage contract. Such later provisions, however, must be reasonable in amount, for to this extent only will they be adjudged onerous. But a deed restricting the heir's interest to a liferent,[7] or converting the estate into an entail,[8] may be challenged and reduced as gratuitous.

1353. It was formerly held that the father's reserved power would sustain reasonable deeds granted by him for other than onerous causes, but the better opinion is to regard the father as precluded from dealing with the settled estate except upon onerous cause.[9] This, however, does not exclude a father's power of reasonable distribution of a sum

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[1] Bell, Com., M'Laren's ed., i. 688.

[2] See *Wilson's Trs.* v. *Pagan or Wilson*, 1856, 18 D. 1096, at pp. 1124, 1128.

[3] *Farquhar-Gordon* v. *Gordon's Trs.*, 1790, Mor. 13028; *Browning* v. *Hamilton*, 1837, 15 S. 999; *Haig* v. *Haig*, 1857, 19 D. 449; *Arthur* v. *Seymour & Lamb*, 1870, 8 M. 928; *Earl of Glasgow's Tr.* v. *Earl of Glasgow*, 1872, 11 M. 218; *Maude* v. *Wright's Trs.*, 1878, 5 R. 570.

[4] *Cunynghame* v. *Cunynghame*, 1804, Mor. 13029; *Cunninghame* v. *Cunninghame*, 20th December 1810, F.C.

[5] *Duncan* v. *Sloss*, 1785, Mor. 987; *Bruce* v. *Glen*, 1761, Mor. 13036; *Haldane* v. *Hutchison*, 1885, 13 R. 179.

[6] *Dykes* v. *Dykes and Hamilton*, 9th February 1811, F.C.; cp. *Ewing* v. *Ewing*, 1799, Mor. 12997.

[7] *Spiers* v. *Dunlop*, 1778, Mor. 13026.

[8] *Gordon* v. *Gordon*, 1731, Mor. 12984; *Watson* v. *Pyot*, 1801, Mor. App. "Prov. to Heirs and Children," No. 4; *Munro* v. *Munro*, 13th February 1810, F.C.; *Graham* v. *Coltrain*, 1743, Mor. 13010; see also *Davie or Laing* v. *Denny*, 1827, 5 S. 903; *Dykes*, *supra*.

[9] *Spiers* v. *Dunlop*, 1778, Mor. 13026; Hailes 806; overruling *Thomson and His Crs.* v. *His Children*, 1762, Mor. 13018; Menzies, Convey., p. 390 *et seq.*

settled upon the children of the marriage. But if the power be exercised so as to exclude a child from sharing, this is equivalent to a gratuitous alienation.[1] This strict limitation of the father's powers was, under the former law, held not to apply to provisions of conquest, and on a similar principle is now held not to apply to cases in which there has been a settlement of the *universitas* of an estate by marriage contract.[2]

Section 6.—Protection not extended beyond Issue of Marriage.

1354. The husband's contract with the wife does not, in general, extend beyond the issue of the marriage, instituted or substituted; as regards substitutes to them, he lies under no restraint, their rights being merely *in destinatione* and alterable at pleasure.[3] But "issue of the marriage" may include grandchildren.[4] Again, the protection against gratuitous acts of the father is in general only pleadable against the father. Upon the heir's succession the contract is fulfilled, and the latter may alter the order of succession as he chooses.[5] But where the father or person *in loco parentis* substitutes children to each other, with a prohibition against gratuitous alienation, express or implied, this vests a *jus crediti* in the substitutes which will prevent their being disappointed by a gratuitous assignation of their prospective shares.[6] Similarly, a prohibition against alteration of the order of succession by the heir during expectancy confers a *jus crediti* upon substitutes, which prevents the heir, by arrangement with the father, from disappointing their rights.[7]

Section 7.—Remedies against Father.

Subsection (1).—*Diligence.*

1355. Where a full *jus crediti* has been vested in the wife or issue of the marriage, they, or trustees for them, may avail themselves of the remedies of creditors, and use diligence to complete their right or in security of their provisions. Thus they may use inhibition against the

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[1] *Campbells* v. *Campbells*, 1738, Mor. 13004; 1739, Mor. 6849; *Watson* v. *Pyot*, *supra*; see *Gillon's Trs.* v. *Gillon*, 1890, 17 R. 435.

[2] *Champion* v. *Duncan*, 1867, 6 M. 19, per Lord Curriehill at p. 22; *Lowden's Trs.* v. *Lowden*, 1881, 8 R. 741; see *Cowan* v. *Young and Reid*, 1669, Mor. 12942; *Oliphant* v. *Furnie*, 1629, Mor. 3066.

[3] *Craik* v. *Craik*, 1728, Mor. 12984; 1735, Mor. 4313; *Trail* v. *Trail*, 1737, Mor. 12985; *M'Donald* v. *M'Donald*, 1877, 4 R. 271; see *Wilson* v. *Reid*, 1827, 6 S. 198; *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10, per Lord Watson at p. 15.

[4] *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88; cp. *M'Murdo's Trs.* v. *M'Murdo*, 1897, 24 R. 458.

[5] Menzies, Convey., p. 657.

[6] *Macreadie* v. *MacFadzean*, 1752, Mor. 4402; cp., however, *Smith* v. *Wallace and Smith*, 1710, Mor. 4332.

[7] *Haig* v. *Haig*, 1857, 19 D. 449.

father,[1] or adjudge in implement,[2] or in security.[3] These remedies are not available to children whose right is only a *spes successionis*.[4] The almost invariable practice which now prevails of constituting a trust for the protection of the wife and issue has rendered this class of case of little value as a precedent, but it illustrates the distinction between a proper *jus crediti* and a *spes*.

Subsection (2).—*What Estate Liable.*

1356. In a question with the father, his representatives, or the cautioner of the father for implement of the marriage-contract obligations,[5] the wife and children, as already stated, are regarded as creditors. Accordingly, while the father's power to encroach on the settled funds by onerous deeds cannot be quarrelled by them, such debts are chargeable primarily against the father's free funds, and it is only when these are exhausted that the settled funds can be attacked.[6] The wife and children have therefore a right of relief not only against the free funds to the extent of the encroachment upon their settled provisions, but also against subjects subsequently acquired by the father.[7] Where the father, in the exercise of his powers as fiar, sells the estate settled upon the heirs of the marriage, he is not bound to invest the price in other lands.[8] If he does so invest, the heir cannot, on his father's death, claim these as a *surrogatum*.[8] In virtue, however, of the father's personal obligation the heir remains a creditor for the value of the estates, the measure of his claim being the amount for which they were sold, not their value as at the opening to the succession.[9] But diligence or security, which may be ineffectual to secure children against onerous creditors, may confer a preference in a question *inter heredes*.[10]

Section 8.—Vesting of Jus crediti.

1357. A *jus crediti* vests without service or confirmation,[11] and the heirs of the marriage, as creditors, may without service reduce gratuitous deeds,[12] or sue the father's representatives to secure their provisions.[13]

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[1] *Douglas* v. *Douglas and Drummond*, 1724, Mor. 12910.

[2] *Lyon* v. *Crs. of Easter Ogle*, 1724, Mor. 8150, 12909; *Crs. of Kenneth Mackenzie* v. *His Children*, 1792, Mor. 12924, affd. 3 Pat. 409.

[3] *Ballingall* v. *Henderson*, 1759, Mor. 12919.

[4] *Gordon* v. *Sutherland*, 1748, Mor. 4398; *Cunninghame* v. *Cunninghame*, 20th December 1810, F.C., per Lord Bannatyne at p. 106; cp. *Grahame* v. *Rome*, 1677, Mor. 12887.

[5] *Dickson* v. *Murray*, 1707, Mor. 12938; *Fotheringham* v. *Fotheringham*, 1734, Mor. 12941; *Herries Farquhar & Co.* v. *Brown*, 1838, 16 S. 948, per Lord Medwyn at p. 972.

[6] *Arthur* v. *Seymour & Lamb*, 1870, 8 M. 928; *Cunninghame, supra*; *Earl of Wemyss*, v. *Wemyss' Trs.*, 28th February 1815, F.C.; affd. 20th May, 1818, F.C.; *Bethune* v. *Bethune*, 1747, Kilk. 460.

[7] *Henderson* v. *Henderson*, 1730, Mor. 12928.

[8] *Cunninghame, supra.*

[9] *Cunninghame, supra*; *Earl of Wemyss, supra*; *Bethune, supra*; see *Hyslop* v. *Small*, 1821, 1 S. 137.

[10] See para. 1348, *supra.*

[11] See *Gordon's Trs.* v. *Harper*, 1821, 1 S. 185.

[12] *Moncrieff* v. *Moncrieff's Crs.*, 1759, Mor. 12871.

[13] *Campbell* v. *Duncan*, 1763, Mor. 12885; *Wallace* v. *Wallace*, 1665, Mor. 12857.

Since the right vests without service, it passes to heirs or singular successors though they should not be served.[1] There is no distinction in this respect between an obligation to provide and secure heritage, and an obligation to provide money; for it is not the subject of the obligation, but the nature of the right, which determines the necessity for service.[2] If, however, the father has actually fulfilled his obligation by securing the provision in terms of the contract, the *jus crediti* is converted into a right of succession to the specific provisions thus secured, which must be taken up by service.[3]

Section 9.—Transmissibility of Jus crediti.

1358. A *jus crediti* may be conveyed not only by *mortis causa* or *inter vivos* deed, but also by simple assignation, followed by intimation to complete the right in the transferee.[4]

Section 10.—Discharge of Jus crediti.

1359. A *jus crediti*, although it be not presently exigible, may be effectually discharged by anticipation. Such a discharge will be valid though the child who granted it should predecease the father.[5] Upon this principle, a gratuitous alteration of the destination by the father, to which the heir has been made a party, is unchallengeable by substitutes, even although the heir should predecease.[6]

Section 11.—Jus crediti in Succession.

1360. In the person of the creditor a *jus crediti* may be heritable or moveable as regards succession to him. The general rule laid down by Lord Westbury is that "a *jus crediti* partakes of the nature and quality of the subject itself, and is governed by the same rules as to transmissibility by descent as are applicable to the subject to which it applies."[7] But this rule neglects the ordinary case where the *jus crediti* is general in its nature and where the subject to which it may eventu-

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[1] Ersk. iii. 8, 38, 73.

[2] *Ogilvy* v. *Ogilvy*, 16th December 1817, F.C.; see *Douglas* v. *Thomson*, 1870, 8 M. 374.

[3] *Finlayson* v. *Finlayson*, 1760, Mor. 12874, 12876; Ersk. iii. 8, 38, 73; cp. *Buchanan* v. *Angus*, 1862, 4 Macq. 374, at p. 378.

[4] Bell, Com., M'Laren's ed., i. 36; Menzies, Convey., p. 689; Bell, Convey., pp. 771, 999; see *Gordon's Trs.* v. *Harper*, 1821, 1 S. 185; *M'Dowall* v. *Russell* (*Crawford's Tr.*), 1824, 2 S. 682, at p. 684; *Tod's Trs.* v. *Wilson*, 1869, 7 M. 1100; as to whether intimation is in all cases necessary to complete the right of an assignee of a *jus crediti*, see *Edmond* v. *Gordon*, 1857, 3 Macq. 116; cp. the Court of Session report in 1855, 18 D. 47, per Lord Curriehill at p. 55.

[5] *Routledge* v. *Carruthers*, 19th May 1812, F.C. 1816, 4 Dow 392; 16th December 1819, F.C.; affd. 1820, 2 Bli. 692; *Graham* v. *Ewen*, 1822, 2 S. 612; rev. 1825, 1 W. & S. 595; Menzies, Convey., p. 669.

[6] *Macdonald* v. *Macdonald*, 1877, 4 R. 271; Bell, Com., M'Laren's ed., i. 686; Bell's Prin., s. 1872; cp. *Haig* v. *Haigs*, 1857, 19 D. 449, but note that in the last-mentioned case there was a prohibition against the expectant heir altering the order of succession.

[7] *Buchanan* v. *Angus*, 1862, 4 Macq. 374.

ally attach is uncertain. In such cases *jus crediti* retains its character as a personal right, and descends to executors.[1] In general, the criterion is the nature of the demand which the holder of the *jus* is entitled to make upon the subject charged with payment of his claim.[2]

[1] *Wardlaw's Trs.* v. *Wardlaw*, 1880, 7 R. 1070 ; see also *Borland's Trs.* v. *Borland*, 1917 S.C. 704.

[2] Bell, Com., M'Laren's ed., i. 36, ii. 4 ; Bell's Prin., s. 1482 ; see HERITABLE AND MOVEABLE. As to the appropriate diligence competent to creditors who wish to attach the right, see Bell, Convey., pp. 991, 1000 ; *Watson* v. *Wilson*, 1868, 6 M. 258 ; *Wilson* v. *Smart*, 31st May 1809, F.C.

JUS DELIBERANDI.

See APPARENT HEIR; ADJUDICATION.

JUS DEVOLUTUM.

See CHURCH.

JUS MARITI.

See HUSBAND AND WIFE.

JUS QUÆSITUM TERTIO.

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Section 1.—Introductory.

Subsection (1).—*Definition.*

1361. When a contract containing a stipulation in favour of a third party, who is named or clearly indicated, becomes irrevocable, the right so stated in the third party vests in him, and on it he can found and sue. Such a contract may amount to a direct creation of a trust in favour of the third party; or it may become irrevocable (1) by intimation, or delivery, or registration; (2) by the death of one of the parties to it; (3) by third parties, on the faith of the contract and for value, acquiring rights under it. This doctrine is known to the law of Scotland as that of *jus quæsitum tertio*. In all the reported cases where a *jus quæsitum* was said to arise, the contracts had been reduced to writing, but there seems to be no sound reason why a *jus quæsitum tertio* should not spring out of an oral agreement; subject, perhaps, to the condition that, as in the case of trusts, the constitution of the obligation in favour of the third party be proved by writ or oath.[1]

Subsection (2).—*Analogy to Right of English* cestui que trust.

1362. The doctrine of *jus quæsitum tertio* forms a deviation from the rule that no third party can sue upon a contract. It resembles, indeed, more closely in its main features the conception of a trust, where the relation of trust arises out of a contract between the truster and trustee, the beneficiary being the *tertius* on whose behalf *jus est quæsitum*. A comparison of the English and Scottish cases emphasises this view. In *Gandy*,[2] Cotton L.J., after stating the rule of law that third parties cannot sue on a contract, continues: "That rule, however, is subject to this exception. If a contract, although in form with A., is intended

[1] But see *Downie* v. *Mags. of Annan*, 1879, 6 R. 457.
[2] *Gandy* v. *Gandy*, 1885, 30 Ch. D. 57.

to secure a benefit to B., so that B. is entitled to say he has a beneficial right as a *cestui que trust* under the contract, then B. would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated." So also Jessel M.R.: "A mere agreement between A. and B., that B. shall pay C. (an agreement to which C. is not a party, directly or indirectly), will not prevent A. and B. from coming to a new agreement next day, releasing the old one. If C. was a *cestui que trust* it would have that effect." [1]

1363. In the following parallel cases, the Scottish *tertius* with his *jus quæsitum* and the English *cestui que trust* shew close affinity. In the Scottish case a husband had inserted in an antenuptial contract a stipulation in favour of his stepmother. He died leaving a settlement by which he revoked this provision, yet the Court held the stepmother entitled to succeed in an action for its enforcement.[2] In the English case of *Gale* [3] the facts were the same, except that the beneficiary was a child of the wife's by a former marriage. Compare, again, the two decisions in *Rose, Murison & Thomson* v. *Gourlay* [4] and *Lloyd's* v. *Harper*.[5] In the former an association of underwriters, before admitting a new member, were in the practice of inquiring into his financial position, and, in certain cases, of requiring a guarantee for underwriting obligations to be contracted by him. It was held by Lord Kyllachy that a guarantee so granted conferred a *jus quæsitum* on any person subsequently assured by such underwriter. In *Lloyd's* case the Court of Appeal held, in similar circumstances, that the body in whose favour the guarantee was granted were in the position of trustees for the benefit of persons whose ships might be underwritten by members of their association. A last example will suffice. A creditor took over from his debtor a farm which belonged to him, part of the consideration being an undertaking by the creditor to pay a debt due by the common debtor to a third party. The third party was found in equity entitled to enforce this stipulation in his favour, this *jus quæsitum* as it would be called in Scotland.[6] These cases establish the relationship of the Scottish doctrine of *jus quæsitum* to the English idea, called equitable, and classified under the head of trusts.[7]

Subsection (3).—*American Law.*

1364. The American Courts hold conflicting views upon the subject, but a great body of authority supports the view that a third party can sue upon a right duly constituted in his favour in a contract which has become irrevocable. For example, "it is the settled law in Wisconsin

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[1] *In re Empress Engineering Co.*, 1883, 16 Ch. D. 125.
[2] *Warnoch* v. *Murdoch*, 1759, Mor. 7730.
[3] *Gale* v. *Gale*, 1877, 6 Ch. D. 144.
[4] 1889, 16 R. 1132.
[5] 1880, 16 Ch. D. 290.
[6] *Gregory* v. *Williams*, 1817, 3 Mer. 582.
[7] See *Carmichael* v. *Carmichael's Exr.*, 1920 S.C. (H.L.) 195, per Lord Dunedin at p. 198.

that when one person, for a valuable consideration, engages with another . . . to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the agreement. After knowledge of and assent to such agreement by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the agreement by the immediate parties thereto." [1]

Subsection (4).—*Principle of Scottish Rule.*

1365. The law of Scotland, however, is well settled, and goes much further than English common law has ventured. The English rule, as enunciated by Pollock,[2] stands (subject to the above exception) thus: The rule is now settled that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may. The final decision was in *Tweddle* v. *Atkinson*.[3] This rule is founded largely on failure of consideration passing between the third party and the obligor, consideration being a sacred requirement of the English system of contract law. For in principle there seems to be no more reason why a man should not undertake to execute a contract in favour of a nominee of the other contractor, than that a person should come forward and adopt a contract made on his behalf by an unauthorised agent. This is the principle upon which our law has taken its stand. "The general rule of the law of Scotland is that every stipulation in a mutual agreement is binding upon the person obliged, whether it is conceived in favour of the other contractor or of a third party." [4] That is, of course, in questions between the parties to the agreement; and, with respect to the third party, in the event of the agreement as between the contractors having become irrevocable.

Section 2.—Requisites essential to confer Right on Tertius.

Subsection (1).—*Intention and Agreement to confer Benefit.*

1366. The stipulation in favour of the third party must be clearly expressed in terms which leave no doubt that a benefit for him is intended, and contracted for. The circumstance that advantage will result to him out of the performance of a contract between A. and B. confers on C. no right whatever.[5] "The *jus quæsitum* must be not merely a *jus* in which the *tertius* is interested; it must be a *jus* which was intended to be beneficial in some way to a third person." [6] Lord Wensleydale said in the same case: "By a stipulation in favour of a

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[1] *Bassett*, 43 Wis. 319, quoted in American Law Review, 1881, p. 238, where the American law is fully discussed.

[2] Pollock on Contract, 9th ed., p. 226.

[3] 1861, 1 B. & S. 393.

[4] *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88, per Lord Watson at p. 95.

[5] *Lindores* v. *Stewart*, 1714, Mor. 7735; *Heron* v. *Martin*, 1893, 20 R. 1001.

[6] *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1857, 3 Macq. 75, per Lord Cranworth at p. 88.

third party I understand an agreement that something is to be done or permitted for the benefit of a third person clearly ascertained, who though not a party to the contract may afterwards come in and insist upon its performance, and in the meantime the actual parties cannot revoke it." [1] And again, in *Peddie's* case,[2] Lord Cranworth said: "It must be not only a *jus tertii* but a *jus quæsitum tertio*; it must be something that was intended to enure to the benefit of the third party. Those words are appropriate and are all necessary in order to enunciate correctly the principle."

1367. The parties, furthermore, must not only intend to benefit the third party, but must make his benefit the subject of express agreement, or the result of a necessary inference. A town hall was built by subscriptions obtained by a town council on representations to the public, in plans and writing, of the nature of the buildings to be erected. The plans shewed rooms dedicated to the use of the town clerk. Here it was held that there was no contract between subscribers and the town council out of which could spring a *jus quæsitum* to the town clerk to demand the offices shewn on the plan.[3] In the case of *Costine's Trs.*[4] a father and son, contracting together concerning the disentail of an estate, agreed that part of the price, a sum of £3000, should be handed to trustees for the son's behoof, reserving to the father power to limit and control the son's interest in this fund to an alimentary liferent. The father subsequently restricted his son's interest to a liferent, and declared that, in the event of the son dying without issue, the fee of the £3000 should pass to C. and D. The son having acquiesced in this deed of appointment, it was notwithstanding held that C. and D. had acquired no *jus quæsitum*, the deed so far as they were concerned being testamentary in character because their interest had not been made matter of contract between the father and son. The cases of *Tait*[5] and *Mitchell's Trs.*[6] furnish also authority against gratuitous testamentary beneficiaries acquiring any vested irrevocable interest under a marriage contract or a mutual settlement between a husband and wife, even although the contract in the latter of these cases contained a declaration that the deed should be irrevocable on the death of one of the spouses.

1368. *Macdonald* v. *Hall*[7] supports the leading proposition that if the right of the beneficiary be the subject of express agreement it will be enforced. Here the question arose out of an antenuptial contract of marriage under which a husband had conveyed to his wife his whole property then belonging to him, or which he might have at his death, in liferent, "and to the children of the intended marriage and the issue of the body of such children," whom failing to his own heirs, etc., in fee, in consideration of an absolute conveyance by the wife to her

[1] At p. 90.
[2] *Peddie* v. *Brown*, 1857, 3 Macq. 65.
[3] *Downie* v. *Mags. of Annan*, 1879, 6 R. 457.
[4] *Costine's Trs.* v. *Costine*, 1878, 5 R. 782; affd. 6 R. (H.L.) 13.
[5] *Tait* v. *Pollocks*, 1738, Mor. 7728.
[6] *Mitchell* v. *Mitchell's Trs.*, 1877, 4 R. 800.
[7] 1893, 20 R. (H.L.) 88.

husband of her whole property. The House of Lords held that a grandchild had, as a conditional institute under this contract, a *jus crediti* which the grandfather could not gratuitously defeat. In the Court below, and on the construction of the words "issue of the body," it had been thought that the deed was contractual only for the benefit of the children of the marriage, exclusive of grandchildren; but the rule of law to be applied was clearly stated by Lord Kinnear: "It is no doubt perfectly competent for the spouses, contracting with each other before marriage, to stipulate for benefits to other persons or classes of persons beside themselves and their children, and if a destination to heirs or to one of the relatives of one of the spouses is the counterpart of an obligation in favour of the other [or clearly contracted for?], it will be just as onerous and irrevocable as the mutual provisions in favour of the spouses themselves. That is perfectly clear. But I am unable to find any indication of onerosity or mutuality in this deed, except in so far as it provides for the wife and the immediate children of the marriage." His Lordship then proceeds to give his reasons for considering the particular provision to be testamentary and not contractual, and that no *jus crediti* had been acquired for the grandchildren.

1369. The stipulation in favour of the third party may be the result of a necessary inference from the terms of the contract in certain circumstances, and notably in the cases of feu-contracts where building restrictions, inserted by the superior in the titles of the feuars, are enforceable at the instance of the fellow-vassals, for each of whom a *jus quæsitum* is said to have been acquired by the superior. In such cases the question is "whether there is sufficient evidence displayed in the titles of parties that the restrictions were imposed and accepted as for the benefit of the body of feuars, on the ground of the judgment in *MacRitchie's Trs.*" [1] "To give a feuar a right to enforce such conditions there must be (1) an express stipulation in their respective contracts with the superior, or (2) a reference to a common plan or scheme of building, or (3) an agreement between the feuars themselves." [2]

1370. Under this head there fall to be dealt with those cases, of which *Robertson* v. *Fleming* [3] may be cited as the leading authority, where the benefit intended for the third party does not spring directly from the contract, and all that the third party can say is that he has sustained a loss through the failure of the obligor to perform his duty. "I have never had any doubt," says Campbell L.C., "of the unsoundness of the doctrine contended for, that A., employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., if, through the

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[1] *MacRitchie's Trs.* v. *Hislop*, 1881, 8 R. (H.L.) 95, per Lord Kyllachy in *Johnston* v. *Walker's Trs.*, 1897, 4 S.L.T. 225; 34 S.L.R. 791.

[2] *Stevenson* v. *Steel Co. of Scotland*, 1896, 23 R. 1079, per Lord Kinnear; and see *Maguire* v. *Burges*, 1909 S.C. 1283, per Lord Dunedin.

[3] 1861, 4 Macq. 167.

gross ignorance and negligence of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B. and recover damages for the loss sustained. . . . The Scotch authorities under the head *jus quæsitum tertio* have no application, for these contemplate a vested right absolutely acquired by a consummated transaction." So, where A. contracts with B. to supply a gangway to a ship, and C., a firm of engineers, contracts with B. to fit engines in the vessel, there is no implied contract between A. and C. which will entitle C. to sue A. for damages resulting to C. from A.'s failure to supply a gangway conform to contract, notwithstanding knowledge on A.'s part, when he made the gangway, that it was to be used by C.[1] The third party, in order to sue the agent or contractor in such circumstances, would have to shew that the latter had been employed on his behalf, or was joint agent for his nominal employer and the third party.[2]

Subsection (2).—*Tertius must be named or clearly indicated.*

1371. The *tertius* must be named or clearly indicated, either as an individual or as a member of a class.[3] He need not be in existence at the date of the contract, if clearly contemplated; as, for example, children who acquire a *jus crediti* at birth in terms of an antenuptial settlement;[4] or persons who after the date of the contract bring themselves within the class on whom its benefits are conferred: as in the cases already noted where associations of underwriters held guarantees for the credit of their members, and the advantage of the customers of those members, or the cases arising under feuing contracts referred to above. A striking instance is furnished by the case of *Morton's Trs.*, where a benevolent society was held entitled to sue for a donation promised to a collector before the society was formed.[5] Here we see another point of divergence between the doctrine of *jus quæsitum* and the rules of contract law which forbid a person, not in existence at its date, to step in and adopt a contract made by an agent expressly on his behalf and in his name.[6]

Subsection (3).—*Contract must be irrevocable.*

1372. The contract must be irrevocable as between the contractors when the *tertius* founds upon it.[7] Some confusion on this point is to

[1] *Campbell* v. *A. & D. Morrison*, 1891, 19 R. 282; *Blumer & Co.* v. *Scott & Sons*, 1874, 1 R. 379; but cf. *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503, which was, however, a case founded on tort and not on any implied rights under contract.

[2] *Lang* v. *Struthers*, 1827, 2 W. & S. 563; *Grant* v. *Forbes and Henderson*, 1758, Mor. 2081; *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31.

[3] *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1857, 3 Macq. 75.

[4] *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88.

[5] *Morton's Trs.* v. *The Aged Christian Friend Society of Scotland*, 1899, 2 F. 82.

[6] *In re The Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16; *Tinnevelly Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009.

[7] See per Lord Dunedin in *Carmichael* v. *Carmichael's Exr.*, 1920 S.C. (H.L.) at p. 201.

be observed among the authorities, it being sometimes said that the contract is irrevocable because there is a *jus quæsitum tertio*,[1] and again that there is a *jus quæsitum* because the contract is irrevocable. The former of these views seems to have the countenance of Stair in the familiar passage wherein he enunciates the law. The text runs: "It is likewise the opinion of Molina, and it quadrates with our customs, that, when parties contract, if there be any article in favour of a third party at any time, *est jus quæsitum tertio, which cannot be recalled by either or both of the contractors*, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform." [2] Now it is clear that if the clause in italics—"which cannot," etc.—were read before the words "*est jus quæsitum*," the authority of Stair could not be claimed for this argument. And such appears to have been the reading adopted by Lord Ardmillan, who says: "According to Lord Stair it is only when there is in a contract 'some article in favour of a third party' which cannot be recalled by one or both of the contractors that there is a *jus quæsitum*. . . . It must be clear that the contracting parties intended to benefit him (the third party), and that they could not, separately or together, revoke the stipulation." [3]

1373. An examination of the authorities cited by Stair bears out Lord Ardmillan's construction of the language.[4] Stair refers to four cases.[5] In two of these decisions the question of intimation or delivery was expressly pointed to as necessary to fix the position of parties; in one of the others the contract as between the contracting parties was completed and *de facto* irrevocable; and in the fourth it was never suggested that the original obligee proposed to resile from his agreement. On principle, it is plain enough that if A. and B. make a contract in C.'s favour behind his back, and nothing follows, they may immediately agree to rescind that agreement. Indeed the stipulation in his favour may be looked on as no more than an uncommunicated offer binding in his favour only when intimated and accepted, or at least when delivered on his behalf in the form of a written deed. Until that moment there is *locus pœnitentiæ* for the contractors. "I don't doubt the principle that when a person who is indebted makes provision for payment of his debts by vesting property in trustees for the purposes of discharging them, but does this behind the backs of his creditors and without communication with them, the trustees do not become trustees for creditors. The arrangement is one supposed to be made by the debtor for his own convenience. It is as if he had put the sum of money into the hands of an agent with directions to apply it in paying specific debts. In such a case there is no privity between the agent and the creditor. The debtor may at any time revoke the authority

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[1] *E.g.* per Lord Ormidale in *Mitchell* v. *Mitchell's Trs.*, 1877, 4 R. 800.
[2] Stair, i. 10, 5. [3] *Blumer & Co.* v. *Scott & Sons*, 1874, 1 R. 379, at p. 387.
[4] *Carmichael* v. *Carmichael's Exr.*, 1920 S.C. (H.L.), per Lord Dunedin at p. 200.
[5] *Nimmo*, 1627, Mor. 7740; *Renton* v. *Aiton*, 1634, Mor. 7721; *Ogilvie & Grant* v. *Ker*, 1664, Mor. 7740; *Irving* v. *Forbes*, 1676, Mor. 7722.

and recall the money placed in his hands. So money consigned on this footing was held to confer no preference as against an arresting creditor.[1] The case, however, is obviously different where the creditor is a party to the arrangement; the presumption then being that the deed was intended to create a trust in his favour, and he is therefore entitled to call on the trustee to execute. So even if he be not a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his debt, the creditor may thereby become a *cestui que trust*, and may acquire a right as such just as if he had been a party and had executed the deed." [2] Further Scots authorities in support of this proposition are noted below in the next paragraph; a reference may, however, be given here to the English decision, *In re The Empress Engineering Co.*,[3] where the test of revocability was held to decide whether a right was conferred upon a third party; and to *Gandy*,[4] where this test was adopted.

SUBSECTION (4).—*When is Contract irrevocable.*

1374. The contract is irrevocable (1) when it amounts to the constitution of an irrevocable trust.[5] See TRUSTS.

(2) By intimation, delivery, or registration. At a meeting of the Burgh Commissioners of Bo'ness it was resolved to increase the salary of their sanitary inspector. The resolution was duly minuted, but not intimated to the inspector. The commissioners shortly after proposing to annul their resolution, the Court decided that they were entitled to do so, want of intimation being fatal to the inspector's claim that he had a *jus quæsitum* under the minuted resolution which made it irrevocable. Lord Trayner said: "I think a sufficient ground of judgment is that the resolution was never intimated to the pursuer. He has therefore no *jus quæsitum*." Lord Moncreiff was of the same opinion.[6] But where a resolution to award a gratuity to the children of a constable was passed by the police authorities and intimated to the children, it was held that a *jus quæsitum* had vested in them.[7] Where the trustee under a trust deed containing a clause directing him to pay debts, advertised for claims, creditors who thereafter intimated claims were held to have acquired a *jus quæsitum* under the intimated deed.[8] Want of intimation also may be the ground of the striking decision in the case of *Henderson* v. *Stubbs*,[9] where the Court was of opinion that third parties

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[1] *Stonehewer* v. *Inglis*, 1706, Mor. 7724.
[2] *Synnot* v. *Simpson*, 1854, 5 H.L. 121, per Lord Cranworth.
[3] 1883, 16 Ch. D. 125.
[4] *Gandy* v. *Gandy*, 1885, 30 Ch. D. 57.
[5] See *Shedden* v. *Shedden's Trs.*, 1895, 23 R. 228; *Byres' Trs.* v. *Gemmell*, 1895, 23 R. 332; *M'Gowan* v. *Robb*, 1862, 1 M. 141; *Kidd* v. *Kidds*, 1863, 2 M. 227.
[6] *Burr* v. *Commrs. of Bo'ness*, 1896, 24 R. 148.
[7] *Campbell* v. *Glasgow Police Commrs.*, 1895, 22 R. 621.
[8] *Cruickshank* v. *Thomas*, 1893, 21 R. 257.
[9] 1894, 22 R. 51.

had acquired no right under a contract between A. and B., although A., who took over the business of B., obliged himself to pay all present and future liabilities of B., howsoever arising. The third party here was suing A. for a slander uttered by B. (prior to the transfer) in the course of his business of publishing "Black Lists." Lord Adam, in delivering the judgment of the Court, denied the vesting of any *jus quæsitum*, on the ground that the contract was revocable as between A. and B. If the transaction be looked on as one of delegation,[1] the ordinary rule of law requiring intimation and the creditor's consent applies. Delivery or registration forms a more perfect form of intimation, with its consequent results when delivery of the deed is to the *tertius* himself,[2] or to an outsider on his behalf;[3] but registration by way of delivery will suffice.[4]

(3) By the death of one of the parties. Two brothers executed a joint deed of entail in terms of which both of them made settlements in favour of a series of heirs. It was held that the heirs of entail obtained a *jus quæsitum* under the deed, in respect that on the death of one of the brothers the deed had become irrevocable, it being assumed that during their joint lives it was open to them to revoke the provision.[5]

(4) Where innocent third parties acquire for value rights on the faith of a contract, the contract is not revocable.[6] Much more so is this the case where the third party contracting on the faith of an agreement is the *tertius* in whose favour that very agreement stipulates. So contracts between superiors and feuars with properly constituted terms in favour of co-feuars become irrevocable, and the right of the third party becomes vested when he too contracts with the superior on the faith of the superior's contract with an earlier vassal.[7]

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[1] *Ogilvie & Grant* v. *Ker*, 1664, Mor. 7740.

[2] *Balvaird* v. *Latimer*, 5th December 1816, F.C.; *Irving* v. *Forbes*, 1676, Mor. 7722.

[3] *Borthwick* v. *Laurie*, 1686, Mor. 7735; *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*, 1889, 16 R. 1132.

[4] *Renton* v. *Aiton*, 1634, Mor. 7721; *Obers* v. *Paton's Trs.*, 1897, 24 R. 719.

[5] *Hogg* v. *Campbell*, 1863, 1 M. 647.

[6] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554; 6 R. (H.L.) 69; *Liqrs. of Mount Morgan (West) Gold Mine* v. *M'Mahon*, 1891, 18 R. at p. 783; Pollock on Contract, 9th ed., p. 634.

[7] *Hislop* v. *MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95; *Stevenson* v. *Steel Co. of Scotland*, 1896, 23 R. 1079; *Johnston* v. *The Walker Trs.*, 1897, 24 R. 1061; cf. *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*, *supra*.

JUS RELICTÆ.
JUS RELICTI.

See HUSBAND AND WIFE.

JUS REPRÆSENTATIONIS.

See SUCCESSION.

JUS TERTII.

See ACTION.

JUSTICE-CLERK.
JUSTICE, COLLEGE OF.
JUSTICE-GENERAL.

See COURT OF SESSION; JUSTICIARY, HIGH COURT OF.

JUSTICE OF THE PEACE.

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Section 1.—Historical.

1375. The office of justice of the peace was instituted in Scotland by the Act of 1587, c. 82, which established commissioners and justices of the peace. This statute was confirmed by the Act 1609, c. 14, which extended the scope of the justices' duties. The Act 1617, c. 8, confirmed the above statutes, laid down at length the procedure for sessions of the justices, appointed the *Custos Rotulorum* to be convener, and appointed him to receive cases reviewed by His Majesty's "Counsall" if returned when the justices were not in session. The Act 1633, c. 25, gave power to the Privy Council to punish justices, and confirmed the above statute. In the Parliament succeeding the Restoration the Act was passed which is still the main statute relative to justices of the peace (1661, c. 38 [c. 338, Thomson's ed.]). This Act confirmed the statutes of 1617 and 1633 above mentioned, the provisions of which it recites almost in full, incorporated Cromwell's "Instructions to the Justices" (1655), and further enacted that the oaths of justices should (in the absence of the Sheriff) be administered by "the president or conveener for the time." The Act 1685, c. 16, gave justices the power to nominate their clerk, but this power was restored to the Secretary of State in the following year, and now lies with the Secretary of State for Scotland, to whom it was transferred by the Secretary for Scotland Act, 1885.[1] There is some evidence that this appointment was formerly made by the *Custos Rotulorum* of the county.[2]

Section 2.—Commission.

1376. The commission under the Great Seal by which justices are appointed is direct from the Sovereign, and addressed to certain officials

[1] 48 & 49 Vict. c. 61. [2] Forbes, Duty and Powers of Justices of Peace in Scotland.

ex officiis and to the other justices *nominatim*. Commissions of the peace were formerly cancelled by the death of the Sovereign, but by the Act 1 Anne, c. 8, a number of commissions, including commissions of the peace, were made to run for six months after the death of the Sovereign granting them, unless repealed at an earlier date. The Demise of the Crown Act, 1901,[1] enacted that such commissions should not be affected by the death of the Sovereign granting them.

1377. The form of commission sanctioned by the Act of 1609 remained unaltered until the Union of the Parliaments. Article 18 of the Treaty of Union equalised the laws of the two kingdoms with regard to Customs and Excise, and the Act 6 Anne, c. 6, gave to Scottish justices all powers with regard to "the peace" enjoyed by their English brethren, provided that "in the sessions of the peace the methods of trial and judgments shall be according to the laws and customs of Scotland." New commissions of the peace were thereupon issued for Scotland (closely modelled upon contemporary English commissions), and the style was not again altered until the passing of the Crown Office Act, 1877,[2] under which the Privy Council were given power to frame rules prescribing the form in which official documents, *e.g.* commissions, were to be worded. An Order in Council,[3] with statutory rules appended, was passed which prescribed [4] a new form of commission of the peace for England and Wales; and [5] that the same form should apply to Scotland, with the necessary substitution of the Scottish for the English judges and law officers.[6]

1378. It will be noted from the form of commission as prescribed by the Statutory Rules of 1878 that "the Keeper of the Rolls" is among those addressed as justices *ex officiis* in the commission. The office of *Custos Rotulorum* appears from the wording of the early Acts,[7] and from the circumstances in which it occurs in a number of charters under the Great and the Privy Seals, to have been synonymous with or held in conjunction with the office of convener of the justices.[8] Neither office has been expressly abolished, but both have long been disused in Scotland. The "Custos," or "Keeper" was not addressed as an *ex officio* justice in the form of commission superseded by the present one, and his reappearance is due to the adoption of the English form, there being still an official styled Keeper of the Rolls in England.

Section 3.—Ex officio Justices.

1379. In addition to the Sheriff and others addressed as justices *ex officiis* in the commission, the following are by statute "*ex officio* justices" of the county in which they hold office:—

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[1] 1 Edw. VII. c. 5.
[2] 40 & 41 Vict. c. 41.
[3] 22nd February 1878.
[4] *Ibid.*, Rule 1.
[5] *Ibid.*, Rule 3.
[6] See Statutory Rules and Orders Revised, 1904 ed., ii. 9.
[7] Acts 1617, c. 8; 1661, c. 38.
[8] Forbes, Privy Seal Reg. ix. (1610) 76 and 80; (1613) 528; and Great Seal Reg. (1614), No. 993.

1. The senior magistrate of any populous place.[1]
2. The convener of the county.[2]
3. The chairman of a district committee or parish council unless personally disqualified.[3]

Ex officio justices qualify by taking the oaths as required for other justices, but on re-election to their respective offices do not require to take the oaths again.[4]

Section 4.—Appointment and Acceptance.

1380. Appointments to the commission are made by the Lord Chancellor. By custom the Lord Lieutenant of the county recommends names for appointment as justices. In many counties advisory committees have been appointed to assist the Lord Lieutenant in this duty, as recommended in the Report of a Royal Commission on the appointment of justices published in 1910. In cases where the co-operation of the Lord Lieutenant cannot be obtained, these committees advise the Lord Chancellor direct. A person named in a commission who does not wish to act may refrain from qualifying by not taking the requisite oaths, but once having qualified he must perform the duties of the office.

1381. A special form of oath prescribed by the Acts of 1617 and 1661 was formerly attached to the commission, to be taken by all justices on appointment (in addition to the other oaths then administered to all officials), which oath was again administered on the demise of the Crown and on the issue of a fresh commission. By the Act 7 Geo. III. c. 9, a justice who had once qualified need not be called upon to take the oaths again on such occasions. By the Promissory Oaths Act, 1868,[5] the modern forms of oaths were introduced, and by the explanatory statute of 1871[6] the sections of the 1617 and 1661 Acts relative to the oaths of justices were expressly repealed. The oaths now required of justices on qualifying are the oath of allegiance [7] and the judicial oath [8] prescribed by the Promissory Oaths Acts. Every person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath may instead of taking such oath make a solemn affirmation [9] in the form appended to the Act.

Section 5.—Qualifications and Disqualifications.

1382. The Acts of 1587 and 1609 define the persons to be appointed justices as ". . . gentlemen . . . residing in their respective shires," and as "honourable and worthie persons . . . and special gentlemen-landed"; but the qualification by estate required in the case of a justice

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[1] 33 & 34 Vict. c. 37.
[2] 52 & 53 Vict. c. 50, s. 10 (1); 9 & 10 Geo. V. c. 71, ss. 1, 4 (2), Schedule.
[3] 57 & 58 Vict. c. 58, s. 40; 9 & 10 Geo. V. c. 71, ss. 1, 4 (2), Schedule.
[4] 60 & 61 Vict. c. 20, s. 1. [5] 31 & 32 Vict. c. 72, ss. 2, 4. [6] 34 & 35 Vict. c. 48.
[7] 31 & 32 Vict. c. 72, s. 2. [8] *Ibid.*, s. 4. [9] *Ibid.*, s. 11.

of the peace for any county or county of a city is now abolished.[1] Sex or marriage is now no disqualification.[2] The general disqualification with regard to solicitors practising in the inferior Courts in Scotland contained in the Justice of the Peace Small Debt (Scotland) Act, 1825,[3] by which it is declared that "no solicitor or procurator in any inferior Court in Scotland, or the partner of any such person, shall be capable to continue to be a justice of the peace, or act as such, in any county in Scotland during such time as such solicitor, etc. shall continue in the business or practice of solicitor or procurator in any inferior Court," was repealed by the Justices of the Peace Act, 1906,[4] but it was enacted that any solicitor being a justice, or any partner of his, may not practise directly or indirectly before the justices for that county or any borough within the county.[5] A road trustee is not disqualified as a justice,[6] nor is a justice disqualified under the Gasworks Clauses Act or Burgh Gas Supply Act because of liability to gas rent.[7] A justice, although a ratepayer or member of a local authority may act under any Act to be executed by a municipal corporation or local authority,[8] or under the Public Health (Scotland) Act, 1897.[9] A commissioner under the Commissioners Clauses Act is not disqualified.[10] In a number of particular instances justices are prohibited by statute from acting as such in regard to the matters therein dealt with.

1383. Under the Factory Acts the occupier of a factory or workshop, and the father, son, or brother of such occupier, with regard to an offence in said factory or workshop, and any person or officer of an association engaged in the same trade as the person charged, are disqualified from acting as a justice in connection with proceedings with respect to an offence under the Acts.[11] Proprietors of salmon fishings or trout fishings are prohibited from acting as justices where they are pursuers or directly interested in prosecutions but not otherwise merely as proprietors.[12] A justice is not disqualified from hearing any case under the Salmon Fisheries Act, 1868, by reason of his being a member of a District Board, but he cannot hear any case in respect of an offence committed on his own fishery.[13] No person who is a brewer, maltster, distiller, or dealer in or retailer of excisable liquors shall act as a member of a licensing court or court of appeal under the Licensing Acts, and the proprietor or tenant of the house or premises for which a certificate is sought is similarly disqualified.[14] Under the Bread Act[15] no miller, mealman, or baker can act as a justice in matters relating thereto. A mineowner, agent, manager, miner, and certain near relations of same, as well as an officer of a mining association, or a check-weigher, or a director of a mine-owning company, cannot act as a member of the Court in the case

[1] 6 Edw. VII. c. 16, ss. 1, 6 (*c*).
[2] 9 & 10 Geo. V. c. 71, ss. 1, 4 (2), Schedule.
[3] 6 Geo. IV. c. 48, s. 27.
[4] 6 Edw. VII. c. 16, s. 5.
[5] *Ibid.*, s. 3.
[6] 41 & 42 Vict. c. 51, s. 113.
[7] 34 & 35 Vict. c. 41, s. 46; 39 & 40 Vict. c. 49, s. 14.
[8] 30 & 31 Vict. c. 115.
[9] 60 & 61 Vict. c. 38, s. 158.
[10] 10 & 11 Vict. c. 16, s. 11.
[11] 1 Edw. VII. c. 22, s. 144 (4), (5).
[12] 9 Geo. IV. c. 39, s. 12; 8 & 9 Vict. c. 26, s. 5.
[13] 31 & 32 Vict. c. 123, s. 34.
[14] 3 Edw. VII. c. 25, s. 9.
[15] 6 & 7 Will. IV. c. 37, s. 15.

of an offence under the Coal Mines Act, 1911.[1] No officer of excise may act as a justice in excise cases, nor any excise trader in any case relating to his trade.[2] Other persons disqualified are persons in the same trade or occupation, as the employer in cases under the Truck Acts,[3] persons guilty of corrupt practices at parliamentary [4] and municipal elections,[5] employers on appeal under the Trade Union Act,[6] and bankrupts or compounders with creditors.[7] The position of a solicitor has already been referred to,[8] but it should be further noted that solicitors who by virtue of being magistrates are *ex officiis* justices of the peace may act as such, provided a declaration is made not to practise in the Court of the justices.[9]

Section 6.—Resignation and Removal.

1384. A justice may resign his office as freely as any other officer of the Crown.[10] The resignation should be duly intimated to the clerk of the peace. A justice is removed either expressly, by writ under the Great Seal, or tacitly, by omitting his name from a new commission.

Section 7.—Powers and Duties.

Subsection (1).—*Administrative Powers and Duties.*

1385. The administrative powers and duties of justices in sessions were materially reduced by s. 11 of the Local Government Act, 1889.[11] But this section, while transferring certain specified matters to the county council, expressly reserved to the justices all their powers and duties not so transferred. Of these reserved powers the most important are:

1. *Duties under the Pawnbrokers Acts.*—By ss. 40 and 41 of the Pawnbrokers Act, 1872,[12] the granting of the necessary excise licence to a pawnbroker is made conditional on the production of a certificate granted by the justices in sessions in the form prescribed by Schedule VI. of the Act. (Certain judicial duties are conferred on Justice of the Peace Courts by the same Act.) See Pawnbroking.

2. *Duties under the Licensing (Scotland) Act,* 1903.[13]—The Act [14] established new Licensing Courts and Appeal Courts to be elected partly by the justices in sessions from their own number and partly by the county council. See Licensing Laws.

3. *Licensing of Playhouses.*—The Theatres Act, 1843,[15] imposes on justices in sessions the duty of licensing buildings for the performance of stage plays, a duty which was, as regards England and Wales, transferred to county councils by the Local Government Act, 1888. Although

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[1] 1 & 2 Geo. V. c. 50, s. 103 (2).
[2] 7 & 8 Geo. IV. c. 53, s. 68.
[3] 50 & 51 Vict. c. 46, s. 15.
[4] 46 & 47 Vict. c. 51, ss. 4, 6 (3) (*b*), 64, 68.
[5] 53 & 54 Vict. c. 55, s. 3.
[6] 34 & 35 Vict. c. 31, s. 22.
[7] 46 & 47 Vict. c. 52, s. 32; 53 & 54 Vict. c. 71, s. 9; 3 & 4 Geo. V. c. 20, s. 183.
[8] Para. 1382, *supra.*
[9] 19 & 20 Vict. c. 48, s. 4.
[10] Blair, Scottish Justices Manual, p. 2.
[11] 52 & 53 Vict. c. 50.
[12] 35 & 36 Vict. c. 93.
[13] 3 Edw. VII. c. 25.
[14] *Ibid.*, ss. 2 and 5.
[15] 6 & 7 Vict. c. 68.

that was not the primary object of the Theatres Act, licences thereunder are sufficient authority to the Commissioners of Excise to issue a licence for the sale of intoxicating liquor in any building. Under s. 9 the justices may frame rules for order and decency to be attached to their licences, and may alter or rescind such rules when they think fit. The Act does not state that these licences must be renewed annually, and the practice has varied in different counties. But having regard to the above-cited provisions for alteration of rules, to the narrative in the few reported cases under the Act, and considering the terms of the Act of Sederunt of 19th March 1910 (fixing the fee payable on "renewal" of such licences), the better practice is certainly to treat them as renewable annually.[1] See THEATRES AND PLACES OF AMUSEMENT.

4. *Licences to Deal in Game.*—Under ss. 13 to 16 of the Game Act, 1860,[2] the justices in sessions grant a licence for the sale of game, and also a certificate to authorise the issue of the excise licence required by the same dealers. See GAME LAWS.

5. *Duties under the Children Act*, 1908.[3]—By ss. 57 (1) and 132 (9) of this Act the powers of justices under the Reformatory and Industrial School Acts (repealed) are renewed. Under this Act these powers must be exercised in "sessions," a point on which the repealed statutes left room for doubt. See EDUCATION.[4]

1386. The principal administrative powers and duties of individual justices are:

1. *Taking Affidavits.*—The appropriate subjects for affidavits other than those required by statute (*e.g.* under the Bankruptcy and Entail Acts) are generally described in the Act 5 & 6 Will. IV. c. 62. See AFFIDAVIT.[5]

2. *The Execution of Deeds by Persons unable to write.*—This is regulated by s. 41 of the Conveyancing Act, 1874,[6] and an appropriate form for the justice's docquet is given in Schedule I. of that Act.

3. *Duties under the Army Act.*—The duties of justices under the Army Act, 1881,[7] as legalised by the Annual Army Act, are dealt with in the article ARMED FORCES OF THE CROWN.[8]

4. *Duties under the Riot Act.*[9]—In s. 2 of the Act the proclamation to be read by a justice in time of tumult is given; the terms are as follows:—

> "Our Sovereign Lord the King chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George the First for preventing tumults and riotous assemblies. GOD SAVE THE KING."

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[1] *Ex parte Harrington*, 1888, 4 T.L.R. 435; *R.* v. *Yorkshire County Council*, 1896, 44 W.R. 650; *Arthur* v. *Lord Advocate*, 1895, 22 R. 382.

[2] 23 & 24 Vict. c. 90.

[3] Vol. I. p. 86, *supra*.

[4] Vol. VI. p. 110, *supra*.

[5] 8 Edw. VII. c. 67.

[6] 37 & 38 Vict. c. 94.

[7] 44 & 45 Vict. c. 58.

[8] Vol. I. p. 520, *ante*.

[9] 1 Geo. I. c. 5.

The same section makes it not merely a power but a duty incumbent on all justices to read the proclamation when occasion arises, they being "required" as well as authorised and empowered.

5. *Swearing in of Constables.*—For serving the warrants of their Court the justices may swear in constables, who are entirely separate from the police force. In some counties the officials discharging these duties are sworn in by the Sheriff as sheriff's officers.

6. *Duties under s. 78 of the Licensing (Scotland) Act, 1903.*[1]—This section requires that a certificate signed by two justices should accompany the application for registration of any club. The Act does not require the two justices to sign together.

1387. By the Local Government (Scotland) Act, 1889, the administrative powers and duties of the justices in regard to gas meters, weights and measures, the appointment of asylum visitors, the registration of the rules of scientific societies, etc. are transferred to the county council.[2]

SUBSECTION (2).—*Judicial Powers and Duties.*

(i) *Civil Jurisdiction.*

1388. The civil jurisdiction of the justices is mainly confined to their Small Debt Court, where debts up to the amount of five pounds may be sued for. Legal practitioners may appear for either party provided no objection is taken thereto either by the Court or by any of the parties to the case.[3] At common law justices have jurisdiction for recovery of wages without limit as to amount, and can enforce contracts of service by warrants of summary imprisonment.[4] Aliment may be awarded for bastard children, but paternity cannot be decided in the Small Debt Court.[5] Justices have no jurisdiction in questions as to cautionary obligations, and this cannot be prorogated.[6] Where any question of heritable right is involved the justices have no powers. Thus in a prosecution under the Salmon Fisheries Acts, where a question of heritable right was involved, it was held that the justices should either have sisted the proceedings or dismissed the complaint.[7]

1389. In these cases the procedure is in as nearly as possible the forms in use in the Sheriff Court, and must be conducted by written pleadings. Interlocutors require the signature of two justices. Procurators of the Sheriff Court may practise before the justices. One justice may issue a warrant to commit a debtor *in meditatione fugæ* until caution *judicio sisti* be found. The debt need not be one subject to the justice's jurisdiction. Decrees of the justices in ordinary civil cases cannot be enforced by diligence against the person.[8]

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[1] 3 Edw. VII. c. 25.
[2] 52 & 53 Vict. c. 50, s. 11 (5).
[3] 6 Geo. IV. c. 48; 12 & 13 Vict. c. 34.
[4] *M'Lellan*, 9th July 1825, F.C., 4 S. 165.
[5] *Lindsay* v. *Barr*, 1826, 4 S. 748.
[6] *M'Kinlay* v. *Nelson*, 1823, 2 S. 249.
[7] *Barlas* v. *Chalmers*, 1876, 3 R. (J.) 26.
[8] *Blaw* v. *Geddes*, 1754, Mor. 7610; *M'Allister* v. *Scott*, 1826, 4 S. 453; *Hart* v. *Anderson's Trs.*, 18 R. 169.

(ii) *Criminal Jurisdiction.*

1390. Under the common law the criminal jurisdiction of justices is chiefly confined to the preservation of the public peace. They try cases of breach of the peace, assaults, petty thefts, and the like, which may all be regarded in the light of offences against the public peace. Their jurisdiction does not extend beyond cases that may be disposed of summarily. As part of the duty of preventing breach of the peace, the process of LAWBURROWS (*q.v.*) may be brought before the justices. Justices have a considerable jurisdiction under a variety of penal statutes, chiefly in reference to Revenue, Highways, and Fishings.

1391. Where power of punishment is committed to justices by special statute the amount is generally restricted in the statute. All other cases are ruled by s. 7 of the Summary Jurisdiction (Scotland) Act, 1908,[1] under which the punishment which justices may inflict is limited to a fine of £10, or imprisonment with or without hard labour for sixty days, and, in lieu of or in addition to said imprisonment or fine to finding of caution to keep the peace for six months and to an amount not exceeding £20, and in default of payment of said fine or such caution not being found, to imprisonment according to the scale prescribed by the Act, the total period in no case to exceed sixty days. Though there are several reported instances of scourging and whipping, it never was a general practice for justices to sentence to corporal punishment.[2] By the Prisons (Scotland) Act, 1860, wherever a judge or magistrate may award a sentence of fine or imprisonment, he may adjudge any male juvenile offender, not exceeding fourteen years of age, to be whipped.[3] The number of strokes must be specified, and must not exceed twelve with a birch rod.[4]

1392. Justices share in the power which all Courts have to enforce order and to punish acts of contempt of their authority. They may try persons on minor charges of deforcement, especially of their own officers, on a complaint by their fiscal. Part of the justices' criminal jurisdiction consists in the apprehension of accused persons, committing them for further examination, or for trial until liberated in the due course of law, and, under the Prevention of Crime Act,[5] in dealing with convicts liberated on ticket of leave.

SECTION 8.—TERRITORIAL JURISDICTION.

1393. Justices can act judicially in civil cases only in the county for which they are commissioned, and in criminal cases their jurisdiction judicially is limited to (1) offences committed in the said county, (2) crimes committed at sea,[6] and (3) offences in reference to which jurisdiction is conferred by statute upon the magistrates of the place of

[1] 8 Edw. VII. c. 65.
[2] Hutcheson, Justice (2nd ed.), i. 220.
[3] 23 & 24 Vict. c. 105, s. 74.
[4] 25 & 26 Vict. c. 18.
[5] 34 & 35 Vict. c. 112.
[6] 57 & 58 Vict. c. 60, s. 685.

apprehension.[1] In purely ministerial functions, *e.g.* taking affidavits, justices may act anywhere within Scotland,[2] and even in England.[3] The Midlothian justices have jurisdiction both in the ancient royalty of the City of Edinburgh and within the area as defined prior to the Edinburgh Extension Act, 1896.[4] It has not been decided whether that Act abolished the jurisdiction of the Midlothian justices within the areas thereby attached to the city.[4]

Section 9.—Courts and Officials.

Subsection (1).—*Courts.*

1394. Sessions of the Peace is the name applied to the Court held by the justices of the peace for a county. It is not a Court "wherein writs are usually registered," and would not, therefore, fall under the definition of the term Court of Record as used by Stair.[5] It is, however, a Court of Record in so far as the procedure of the Court is regularly entered in a sederunt book by the clerk, and authenticated by the subscription of the presiding justice; proofs are generally taken in writing; extract judgments are given out, and all processes are preserved. That the character of the Justices' Court in Scotland might not be affected at the Union it was provided by 6 Anne, c. 6, that in the sessions of the peace the methods of trial and judgment shall be according to the laws and customs of Scotland.

1395. The Quarter Sessions is the meeting of the justices of the peace for a whole county. Extensive counties are usually divided into districts, for the more frequent meeting and speedy administration of justice, but no justice's jurisdiction is thereby limited. Such division is now required by the Licensing and Small Debt Acts. The times of their meeting are prescribed by statute.[6] "The Justices of Peace in each shire shall meet and convene together four times in each year, on the first Tuesday in May, on the first Tuesday in August, on the last Tuesday in October, and on the first Tuesday in March, with power to continue the said sessions, or to adjourn the same to such days as shall be most convenient." The custom is to meet on the day specified, and if it be for a special reason inconvenient, to appoint a day certain to which to adjourn. To such adjourned sittings the name "General" or "General Quarter Sessions" is more properly applied. If no quorum attend on the day appointed, the quarter sessions may be held on any other day during the quarter of the year. The quarter sessions are held at the head burgh of the county, even when it is an incorporation having its own justices. The Court is called by the clerk; formerly, on important occasions, intimations used to be issued by a prominent justice—for instance, the Lord Advocate was in use to summon the justices for the County of Edinburgh.

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[1] Macdonald, Criminal Law, 2nd ed., p. 288.
[2] *Turnbull* v. *Smellie*, 1828, 6 S. 676.
[3] *Kerr* v. *Marquis of Ailsa*, 1852, 14 D. 864.
[4] *Wright* v. *Bell*, 1905, 8 F. 291.
[5] Stair, ii. 3, 63.
[6] 1661, c. 38, s. 3.

1396. Besides the regular district meetings, justices in Scotland have always been in the practice of holding Courts at any time, though not by way of adjournment of the quarter sessions. They may sit at all times, except Sundays, in matters which concern the public peace. The Act 1617, c. 8, s. 20, enacts that three justices shall be a full number and session to decide in matters betwixt the four quarter sessions, but the commission expressly assign to *two or more* of the justices the powers committed and two has been held sufficient.[1] One justice alone cannot act judicially unless specially authorised by statute.[2] At the first meeting of the sessions after a new commission arrives in the county, it is read in Court. Each meeting elects its own chairman, who has no casting vote. The procurator-fiscal prosecutes, or gives his concurrence to prosecution by a private party.

1397. A judgment in quarter sessions cannot be reviewed by a later quarter sessions. An appeal taken to quarter sessions during proceedings in special sessions "does not stop the justices from proceeding and finishing the cause by sentence; but if against such a sentence an appeal be entered, they should admit the appeal, and not proceed to execution until the same be discussed." [3]

1398. The quarter sessions have the power of reviewing the judgments of the justices in petty sessions. More than the necessary quorum of two are therefore usual in quarter sessions for the hearing of appeals, and in some counties a practice exists of requiring more than a specified number to be present. An equality of votes may be got over by one justice withdrawing or another justice being brought in. Where the equality arises on an appeal, the judgment appealed against ought to be affirmed, or preferably the cause should stand adjourned for a further hearing at a future meeting, or by a bench composed of different justices. There appears to be no legal exclusion of a justice sitting in quarter sessions and voting in review of his own judgment. The impropriety is obvious unless it be to rectify an erroneous judgment he may have given. Justices in quarter sessions, on appeal, must rehear the evidence led before the justices in petty sessions. Should the quarter sessions refuse, their judgment is liable to suspension.[4] It has been held that a bill of advocation for review of a judgment of the justices in quarter sessions which merely sustained the competency of an appeal from petty sessions against a conviction under the Prevention of Cruelty to Animals Act, 1850, was incompetent.[5] Refusal on insufficient grounds to hear an appeal may cause a conviction to be suspended.[6] In all judicial proceedings the justices must hear and act together.[7]

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[1] *Reid* v. *Finlayson*, 1730, Mor. 7636.
[2] *M'Kay* v. *Hercules*, 1760, Mor. 7637.
[3] *Meldrum* v. *Brown*, 1746, Mor. 7637.
[4] *Muckersie* v. *M'Dougall*, 1874, 3 Coup. 54; 2 R. (J.) 12.
[5] *List* v. *Pirie*, 1867, 6 M. 185.
[6] *Murray* v. *Jones*, 1872, 2 Coup. 284.
[7] *Rex* v. *Forrest*, 1789, 3 T.R. 38.

SUBSECTION (2).—*Clerk of the Peace.*

1399. By the Act 1685, c. 15, the justices themselves were empowered to nominate their clerk, but the appointment now lies with the Secretary of State for Scotland,[1] coming in room of the Secretary of State.[2] The clerk may be suspended or removed only by the Court of Session.[3] Bankton was of opinion,[4] following Craig,[5] that the clerks of all inferior Courts ought to be notaries,[6] but this has been disregarded in practice, and no special qualification is necessary for a clerk of the peace.[7] He, like the depute clerks mentioned below, is, however, usually a qualified lawyer. For convenience sake, large counties are generally divided into districts by the justices, a depute clerk being appointed for each district by the principal clerk of the peace. He is responsible for his deputes, and may recall the deputation at pleasure. All the clerks must take the usual oaths for the faithful performance of their duties.[8] Where the ordinary clerk fails to attend any particular Court, the justices present may appoint a clerk for that Court. Clerks and depute clerks are prohibited from practising as agents in the Courts of which they are clerks.[9] Clerks so acting may, on complaint to the Court of Session, be fined and suspended,[10] or found liable in the expenses of the complaint;[11] and in *Smith*,[12] where the clerk had acted as agent for the prosecuting party, a conviction by the justices was set aside, although the accused's agent had consented in writing to his so acting.

1400. The powers and duties of the clerks of the peace, and their deputes, in regard to the justices and their Courts, are analogous to those of the sheriff-clerk in the Sheriff Court. They have to attend the justices in their civil and criminal Courts, both in petty and quarter sessions; they issue small debt summonses, and have the care of all processes, such as they are; they act as clerks when the justices sit for licensing purposes, whether in sessions, or as a county licensing committee, or as a joint committee;[13] they keep the books of record, and make the necessary entries therein; and, although not formally appointed assessors to the justices when acting judicially, they practically perform the duties of that office. Clerks of the peace in England, and sheriff-clerks in Scotland, must take the custody of such documents (*e.g.* maps, plans, sections, etc.) as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.[14] The fees of the clerks are regulated by statute.[15]

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[1] 50 & 51 Vict. c. 52, s. 2.
[2] Acts 1686, c. 20; 1690, c. 28.
[3] Barclay, Justice's Digest, *h.t.*
[4] iv. 4, 9.
[5] Dig. iii. 7, 20.
[6] Hutcheson, Justice of the Peace, i. 51.
[7] Boyd, Justice, 84.
[8] Barclay, Justice's Digest (Chisholm).
[9] Act of Sederunt, 6th March 1783.
[10] *Sellar and Thomson* v. *Duff and Bain*, 11th February 1809, F.C.
[11] *Campbell* v. *M'Farlane*, 1830, 4 W. & S. 123.
[12] *Smith and Tasker* v. *Robertson*, 1827, 5 S. (N.E.) 788.
[13] 3 Edw. VII. c. 25, s. 8.
[14] 7 Will. IV.; 1 Vict. c. 83.
[15] See 6 Geo. IV. c. 48; 39 & 40 Vict. c. 36; 3 Edw. VII. c. 25.

SUBSECTION (3).—*Fiscal.*

1401. The fiscal in the Justice of the Peace Court is appointed by the justices, and may be dismissed as and when they deem it expedient.[1] He is subject to the control of the Lord Advocate and Crown counsel, and may be removed by the former. He prosecutes in the Justice of the Peace Court, and usually has awarded to him the fees in prosecutions with the addition of a salary in certain cases. He enjoys the same immunity as judges in respect of actions of damages against him.[2]

SUBSECTION (4).—*Constable.*

1402. The justices have power to swear in their own constables for the due execution of the warrants issuing from their own Courts. These constables, or one or more of them, attend the justices at all their Courts, and one of them usually acts as officer of Court, or "crier."

SECTION 10.—REVIEW.

1403. In common with those of other inferior Courts, the decisions of the Justice of Peace Court are subject to review by the Court of Session except where excluded by statute. The jurisdiction of the High Court may be excluded by appeal to quarter sessions.[3] But as almost all the jurisdiction is statutory, review is either specially provided for or altogether excluded.[4] Review in Justice of Peace Small Debt cases is excluded in all cases except on the ground of malice and oppression, and then only within one year from the date of decree.[5] "How far this provision would exclude reduction on the ground of departure from the statutory procedure or excess of jurisdiction is not clear."[6] Though review is specially excluded, reduction may be competent in civil cases. See REDUCTION.

SECTION 11.—REMUNERATION.

1404. The services of justices are given gratuitously, but they are entitled to be reimbursed for proper expenditure in official business. The county council provides for all expenses lawfully incurred by the quarter sessions or the justices out of sessions.[7]

SECTION 12.—RESPONSIBILITY.

1405. Justices are liable to prosecution civilly before the Court of Session, and criminally before the Court of Justiciary.[8] When there

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[1] *Rose* v. *Grant*, 1853, 25 Sc. Jur. 535.
[2] 8 Edw. VII, c. 65, s. 59.
[3] *Robertson* v. *Duke of Atholl*, 1869, 8 M. 57; *Dorward* v. *Mackay*, 1870, 1 Coup. 392.
[4] Mackay, Manual of Practice, p. 98.
[5] 6 Geo. IV. c. 48, s. 14.
[6] Mackay, Manual of Practice, p. 630; *Thomson* v. *Allan*, 1852, 14 D. 479.
[7] 52 & 53 Vict. c. 50, s. 89.
[8] Hutcheson, Justice of the Peace, etc., i. 63; *Hay* v. *Cockburn*, 1731, summarised there.

has been excess of jurisdiction and gross neglect of prescribed forms, especially where the liberty of the subject and the provisions of the Act 1701, c. 6 (for the prevention of wrongous imprisonment and against the undue delay of trials), are concerned, *bona fides* will not in general save a justice from being subjected in damages. Protection is given to justices in the execution of their duty by the Twopenny Act,[1] which enacts that in all actions brought against a justice on account of any conviction by him, in case such conviction shall be quashed, the plaintiff shall not be able to recover, besides any penalty levied, greater damages than twopence, nor costs, unless malice and want of probable cause are alleged. And if the justice prove at the trial that the plaintiff was guilty of the offence whereof he had been convicted, no damages shall be recoverable. The Act 9 Geo. IV. c. 29, s. 26, extends these provisions to all inferior judges and magistrates in Scotland in regard to any sentence pronounced, or proceeding tried, in any criminal trial. "All acts done by any judge or magistrate in apprehending any party, or in regard to any criminal cause or proceeding, or to any prosecution for a criminal penalty," are also so privileged.[2] Immunity is also conferred in the case of actions of damages brought against judges unless in certain specified circumstances.[3] Justices were anciently answerable for any miscarriage in their office to the Privy Council of Scotland, and are now so answerable to the Privy Council of the United Kingdom.[4]

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[1] 43 Geo. III. c. 141.
[2] 11 Geo. IV. & 1 Will. IV. c. 37, s. 13.
[3] 8 Edw. VII. c. 65, s. 59.
[4] Forbes, ii. c. 1, s. 30.

JUSTICIARY, HIGH COURT OF.

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Section 1.—Historical.

Subsection (1).—*Introductory.*

1406. The High Court of Justiciary is the supreme criminal tribunal in Scotland, and its jurisdiction in criminal matters, except where expressly limited by statute, is both universal in point of extent and supreme in matters of degree. Its decisions are not subject to review by any tribunal.[1] It was instituted in its present form by the Act of 1672, c. 40. The earlier history of the Justiciar's Court, of which the head was the King, and which was the only Sovereign Court in the kingdom, and the direct ancestor of the High Court as now existing, may be noticed briefly, and the stages of its development may be classified as follows: (1) The Justiciar's Court; (2) the High Court as instituted by the Act of 1672; and (3) the High Court as constituted by the Act of 1887.

Subsection (2).—*The Justiciar's Court.*

1407. From a distant date in our history, the Justiciar, a Great Magistrate or Officer of State, held what was called the King's Court,

[1] *Mackintosh* v. *H.M. Advocate*, 1876, 3 R. (H.L.) 34; 2 App. Cas. 41.

"*Curia domini Regis vel Justiarii*," where all barons and dignified persons of the realm owed suit and presence. To this Court belonged supreme cognisance of all controversies of every kind.[1] The King was the head of the Court, and the Justiciar and the Justiciar's Clerk, Justice Deputes, and Assessors acted with him. The date of the first appointment of the "Justice," or "Justiciar," is obscure. In a fragment of the laws of King Malcolm McKynneath, early in the eleventh century (probably 1005–34), a provision is made "for the sustentation of the Justice and to his Clerk."

1408. In the earliest period of the office there was one Justiciar for the whole kingdom, but later two were appointed, for separate regions, and each exercising within his bounds the same absolute and supreme powers. When this partition of the office came to be made is not known, but it existed in the reign of Alexander II. (1214–49), if not earlier. In this reign there was one Justiciar for Scotland, meaning the country north of the Forth, or Scottish Sea, as it was sometimes called, while the second Justiciar exercised sway over Laudone, or Scotland south of the Forth. In the reign of Alexander III. (1249–86) a powerful family — the Comyns — obtained the erection of a separate and supreme Justiciary for Galloway. In 1305 Edward I. (of England) appointed eight justiciars, one Englishman and one Scotsman for each of the four districts into which he divided the country. The four districts were Laudone and Galloway (south of the Forth), and two districts north of the Forth, divided by the Grampian Hills. King Robert the Bruce reverted to the former plan of two justiciars, one for the north and the other for the south of the Forth, and the Galloway justiciarship fell with the fortunes of the Comyn family.

1409. The two appointments were again united under one Commission in the reign of Queen Mary, as appears from a memorial drawn up for her use in 1559. Later the appointment underwent a change and the office became a sinecure. Instead of being bestowed for life on a party qualified for the post, it became a hereditary post in the hands of the Argyle family. The date at which it fell into their hands is not known. During the Commonwealth (in 1662) Commissioners were appointed to look after criminal affairs in Scotland, and this system continued till the Restoration, when the appointment again became hereditary in the Argyle family.

1410. That an office which required "an union of the rarest qualifications towards the competent discharge of its interesting functions"[2] should be possessed by any family in perpetuity was felt to be wrong, and the office was resigned *ad remanentiam* into the hands of the King, by contract made in April 1628 between Charles I. and Archibald, Lord Lorn, which was ratified by Act of Parliament in 1633. By this contract the sheriffdoms of Argyle and Tarbert, and the Scottish Isles, excepting Orkney and Shetland, along with certain other lands specified

[1] Hume, ii. 1. [2] *Ibid.*, 14.

in the contract, were excepted, and these remained with the Argyle family till abolished by the Heritable Jurisdiction Act of 1747.[1]

1411. To the office of Justiciar "belonged the supreme cognisances of all controversies of every kind."[2] The King officiated with the Justiciar in the High Court—doubtless to give added weight and dignity to the Court; and during several periods in the history of the country this was considered necessary for the repression of disorder. Thus we find statutes enjoining the King's presence, viz. in 1357—Parliament held at Scone—in 1488, and in 1491.[3]

1412. In civil matters minor encroachments on the universal jurisdiction of the Justiciar were made by the establishment of the Civil Courts, viz. the Court of Session in the reign of James I., and the Daily Council in the reign of James IV.; but by the institution of the Lords of Council and Session, or College of Justice, in the reign of James V. (1532), the Justiciar was relieved of civil work. The Lords of Regalities also claimed exclusive jurisdiction within their own bounds, but after the institution of the High Court in 1672 these interferences faded away. There are instances of appeal from the judgments of the Justiciar in civil cases to the Court of Parliament: "gif the said doom be falsed" (*i.e.* protested for appeal), the King "sall depute thirtie or fourtie persons . . . quilk sall have power as it were in an Parliament to discuss and decide the said doom." It is very unlikely that such a power of review was exercised in criminal matters, except in cases of forfeiture following on sentences for treason. The Act Alex. II. c. 2 excluded review of sentences in cases of theft and murder.

1413. The Justiciar, when his Commission empowered him, made deputies to act along with him or in his absence. By Statute 1587, c. 82, he was to make "aucht deputies," but he "may nocht make" them unless he had special power in his Commission "to do the samin." The King and the Privy Council on extraordinary occasions also made deputies, but this power virtually ceased after 1672, when the Justiciary Court was reconstituted.[4]

Subsection (3).—*The High Court as Instituted by the Act of* 1672.

1414. The Act of 1672, c. 40, narrated that causes criminal and the punishment of crimes are "of the greatest importance and ought to be determined in the most solemn, exact and regular way," and that "formerlie assessors from time to time were appointed to the Justice-General in matters of importance, which being ambulatory cannot be soe convenient as if all the members of that Court were setled and choysen by his Majesty of fitt persones who might make it their worke to make a just and constant procedure in matters criminall." The Act suppressed the office of Justice-Depute, and ordained that

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[1] 20 Geo. II. c. 43.
[2] Hume, ii. 1.
[3] See Circuit Courts, paras. 1451, 1452, *infra*.
[4] 1672, c. 40.

"five of the Judges of the Court of Session be joyned to the Justice-General and Justice-Clerk," who were all to be invested with the same and equal power and jurisdiction in matters criminal. The Justice-General when present was to preside, and in his absence the Justice-Clerk, and in the absence of both, "that these present elect one of their number to preside."

1415. The Court was to meet every Monday during session at nine o'clock, and four of the judges were to be a quorum. By a later statute [1] the quorum was reduced to three during the vacations of the Court of Session, and this regulation was afterwards made to apply to sessions and vacations.[2] The Court was empowered to regulate the inferior officers thereof, and "order every other thing concerning the said Court," *e.g.* pass Acts of Adjournal, etc. The Justice Court, like all other Law Courts, was formerly restrained from meeting during sessions of Parliament, as the latter had a preferable claim to the attendance of all the lieges, and especially to that of the Lord Justice-General, the Lord Advocate, and the Lord Justice-Clerk, who are officers of State.

1416. The Act further made provision for holding justice ayres, regulation of Court officers, and premises, judges' robes, preparing and serving criminal libels, lists of witnesses and assizers, and enacted that the "Defender or his Advocates be allways the last speaker except in cases of Treason and Rebellion against the King." This Act was considered as a final and thorough delegation of all His Majesty's judicial powers in criminal matters.

Subsection (4).—*The Lord Justice-General.*

1417. The Lord Justice-General, as head of the criminal jurisdiction, and as Lord President of the Court of Session, holds the chief legal appointment in Scotland. His office is in direct lineal descent from the oldest judicial office in the country, that of the Scottish Justiciar. The name Justice-General first appears in the Act 1487, c. 2,[3] which "ordainit that ane or twa Justice Generale be deput." In a later Act of the same year [4] four persons were named to be "Gret Justice," and later the Act 1584, c. 8,[5] refers to the "Justice." With these two exceptions the title uniformly used after 1487 is Justice-General. The Earl of Argyle is mentioned as Justice-General in the sederunt of a Court held by his deputy, Patrick, Baron of Spittalfield, on 25th August 1526, but it is uncertain whether at this date the office was held by personal commission or by heritable grant.

1418. The appointment of Justice-General having returned to the Crown, the office was bestowed upon various members of the nobility for periods extending from a year to "for life," and carried with it power to appoint deputies. In 1793 the last "lay" appointment

[1] 1681, c. 22. [2] 23 Geo. III. c. 45. [3] Thomson's Act, ii. 176.
[4] c. 5, Thomson's Act, ii. 182. [5] Thomson's Act, ii. 286.

was made, when the office was conferred on James, third Duke of Montrose. After his death on 30th December 1836 the office was united with that of president of the Court of Session,[1] and the real presidency of the High Court, which had devolved on the Lord Justice-Clerk, was resumed by the Lord Justice-General, and the ancient dignity of the "Great Magistrate or Office of State" restored in the person of Charles Hope of Granton, Lord President, who was admitted in Court as Lord Justice-General on 23rd January 1837. By the same Act the Justice-General was empowered to hold Circuit Courts, "whether any other judge or judges of the Court of Justiciary be or be not present," [2] but in practice he does not go on circuit. The Act of 1672 directed that the Justice-General when present was to preside in the Justiciary Court. From 1746 [3] onwards it was not competent for him to sit in Circuit Courts alone or with only one other judge, because he as President of the Court, and yet not necessarily a lawyer or versed in the course of criminal practice, might with his casting vote have overruled the opinion of any other of the judges who happened to be his only colleague on circuit. This restriction, which continued till 1830, was then removed,[4] and finally the Justiciary (Scotland) Act, 1868,[5] provided that the Lord Justice-General, Lord Justice-Clerk, or any single judge may preside alone at any criminal trial.

SUBSECTION (5).—*The Lord Justice-Clerk.*

1419. The Lord Justice-Clerk derives his designation from his former relation to the Court of Justiciary. The Justice-Clerk was originally not a judge, but was the clerk to the Justice Court. He seems to have still occupied this position in the reign of Charles I., for we find the Justice-Clerk again and again named assessor to the Justice—a post which his constant attendance in Court and familiarity with criminal procedure would render him peculiarly fitted to fill. The office gradually rose in credit, until, from the Justice-Clerk being named an assessor, others came to be named assessors to him.[6] This happened in the trial of George Graham, when the Council, on 24th November 1663, appointed certain lords "to be joined as assessors to the Lord Justice-Clerk and Justice-Depute." In the Sederunt following upon this Act the name of the Justice-Clerk (Lord John Home of Renton) is for the first time inserted as one of the judges of the Court. As this innovation was probably looked upon with disfavour, an Act of Council, passed on the 8th of December of the same year, declared "That the Lord Justice-Clerk is one of the judges of the Justice Court, and has power to sitt and voat therein"; and the seat thus acquired, which in practice was that of President of the Court, was confirmed to him in 1671, when the Court was reconstituted.

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[1] 11 Geo. IV. & 1 Will. IV. c. 69, s. 18. [2] *Ibid.*, s. 19. [3] 20 Geo. II. c. 43, s. 32.
[4] 11 Geo. IV. & 1 Will. IV. c. 69, s. 19. [5] 31 & 32 Vict. c. 95, s. 3.
[6] See *Crombie*, 22nd June 1625, and *Meldrum*, 2nd August 1633 (Hume, ii. 16).

1420. The origin of the office is, like that of the Justiciar, so obscure that it cannot be traced. It probably came into being about the same time as the latter office, but it may have existed even before a Justiciar was appointed, when the Sovereign himself administered justice. In this early Court a *clericus* would be required. The art of writing was confined to a privileged few; even kings could scarcely write, and few nobles could sign their names. In the same fragment of the laws of Malcolm II.[1] which refers to the "Justice," we also find, "an allowance granted to his clerk for each man unlawit" or sold. Certainly his duties included mainly the clerkship in the Justice Court,[2] but there is substantial material for noting that the appointment from an early period also included higher and other duties.

1421. Long before the institution of the High Court in 1672 we find that this post had been one of considerable standing, varying doubtless in importance with the particular holders of the appointment and with the times. In 1488 Richard Lawson of Hariggs (Highriggs) was appointed Justice-Clerk, and was one of James the Fourth's Council of State. In 1503 he was appointed King's Advocate jointly with James Henderson of Fordell, who had been appointed King's Advocate in 1494, and he continued holding both offices till his death in 1507, when James Henderson became Justice-Clerk, and continued holding both offices as Advocate and Justice-Clerk until 1513, when he and his son were killed at Flodden.[3] By 1593, c. 46, the Justice-Clerk is directed to be always in attendance on the King,[4] and later it was directed that he was to be "always" a member of the Secret Council (Privy Council). "It is decreed and ordained that My Lord Treasurer, Secretary, and Clerk of Council and Justice-Clerk and Advocate be of Council and remain continually thereon." By 1587, c. 59, the Justice-Clerk, Treasurer, and Clerk of Register were ordained specially to superintend the administration of justice in the Borders and Highlands.

1422. In 1564, in the course of a trial in the Justice Court, counsel took exception to the presence of the Justice-Clerk. In repelling the objection the Justice found that the Justice-Clerk being "Ordinar" (*i.e.* Lord Ordinary) could not be removed or deprived of his vote.[5] In 1610 an entry in the Privy Council,[6] giving instructions as to the robes of the Justice-General: "When he" (Justice-General) "sits in his criminal court and seat of judgment, the Justice-Clerk and Justice-Clerk Principal . . . and also of the Clerks of the same Court," at least suggests that he had subordinate officers to attend to the clerical duties of the Court. In the Commission from the King (Charles I.) to Sir Charles Napier of Merchieston, recorded 28th November 1623, he was constituted "Clarke of our Justiciarie Generall," and "Maister of the Ceremonies at the creation of all Earles, Lordis, and Barronnes, and of all other assemblies, quhair honourable assemblies are accustomed

[1] Malcolm McKynneth, Acts of Parliament of Scotland, i. 709.
[2] See Clerk of Justiciary, para. 1475, *infra*.
[3] Douglas Baronage, 518.
[4] 1545, P.C., ii. 598.
[5] Pitcairn, i. 443.
[6] Reg. Privy Council, viii. 614.

and necessaire to be usit," and the same Commission empowered him to appoint deputies, "and thaime to remove, inpute and output at his plesour." Hence for long afterwards the Justice-Clerk appointed the Principal Clerk of Justiciary. This latter appointment now lies with the Crown.[1] Similar Commissions were afterwards granted to Sir John Hamilton of Orbiston (9th November 1636) and to Sir John Home of Renton (recorded 10th December 1663). The Act or warrant relative to an Order of the Privy Council of 24th November 1663 is expressed as if the Justice-Clerk had already been a known judge of the Justice Court, and he is referred to as the Lord Justice-Clerk. In the Sederunt of the Court of 1st December 1663 the name of the Lord Justice-Clerk is for the first time inserted as one of the judges of the Court, and in the Sederunt of 10th December 1663 there is produced a second Act of Council, dated 8th of that month, which declares that the Lord Justice-Clerk "is ane of the judges of the Justice Court."

1423. At the establishment of the High Court in 1672 the Justice-Clerk ranked next to the Justice-General, and presided at all sittings of the High Court in the absence of the latter, but as a judge in the Court of Session he was on an equal footing with the others, until he was made President of the Second Division of the Court in 1808.[2] His office is now the second highest judicial post in Scotland. He is Vice-President of the Court of Justiciary, taking the chair at its deliberations in the absence of the Lord Justice-General. In addition to his judicial position he is *ex officio* one of the Officers of State for Scotland, and one of the Commissioners for keeping the Scottish *regalia*.

1424. According to the scale of precedence issued by the Secretary for Scotland, the Lord Justice-Clerk ranks immediately after the Lord Advocate. In 1628 Sir George Elphinstone sought to vindicate his claim to precedence over the Lord Advocate, who had been granted priority by Act of Council in 1623. The Justice-Clerk's appeal to the Privy Council states that "in anno 1489 Mr. Richard Lawson of Hierigs, Justice-Clerk, was a judge . . . the advocate continewes a pleader before the Session and Justice whair the Justice-Clerk sitts as a judge at the least principall assessour in cases civill and criminall." The appeal was unsuccessful, and the present order of precedence may be held as commencing in 1623.

Section 2.—The High Court as now Constituted.

Subsection (1).—*Judges.*

1425. The High Court as presently constituted under the Criminal Procedure (Scotland) Act, 1887,[3] consists of all the Senators of the College of Justice, viz. the Lord Justice-General, the Lord Justice-Clerk, and the other eleven Lords of Session. Every person appointed to the

[1] 2 & 3 Vict. c. 36, s. 3.
[2] 48 Geo. III. c. 151, s. 2; 35 & 36 Vict. c. 97, s. 1.
[3] 50 & 51 Vict. c. 35, s. 44.

office of Senator of the College of Justice in Scotland is "in virtue of such appointment a Lord Commissioner of Justiciary." The Lord Justice-General takes the chair, and in his absence the Lord Justice-Clerk, who is next in seniority, presides, and in the absence of both of these, the judges rank in seniority according to the dates of their Commissions.

Subsection (2).—*Robes.*

1426. "The Justice-General when he sittis in his Criminall Courte and Seate of Judgement sall weare a reid Scarlatt gowne faced with quhyte armyne with a hude of the same lynned also with quhyte armyne and the Justice-Depute and Justice-Clerk principall sall weare blak gownis with hudis faced and lynned with reid crimosine satyne as is aforesaid." [1] Later, by the Act of 1672, it was directed "that for the splendour of that Court all the Judges sitt in redd robes faced with white, that of the Justice-Generalls being lined with ermine for distinction from the rest." The scarlet decorations on the capes and robes, though now in the form of a cross, were originally rosettes with ribbons of the same colour attached, for the purpose of tying across. Gradually the ribbons disappeared, and the rosettes assumed the shape of a cross and are now crossed scarlet bands. Mushings or small square holes of two sizes are punched out in rows in the white satin of the robes of the Lord Justice-Clerk to give the appearance of ermine. These holes appear in the Justice-Clerk's robes as early as 1699. When attending any State function, *i.e.* Court levees, Circuit processions, inspecting a military guard of honour, or attending in church at the commencement of each session, the judges wear their justiciary robes and wear or carry a Court hat. They also assume the Court hat when passing sentence of death.

Subsection (3).—*Salaries of Judges.*

1427. The salaries paid to the judges are fixed by s. 5 of the Criminal Procedure (Scotland) Act, 1887, as follows: The Lord Justice-General, £5000 a year; the Lord Justice-Clerk, £4800 a year; and each of the other judges, £3600 a year. The judges are not entitled to any allowance in addition to these salaries in respect of any Court held by them as Lord Commissioners of Justiciary, whether on circuit or otherwise.

Subsection (4).—*Macers.*

1428. The Justice Court has its macers, "in which they are not stented to a particular number." [2] There are now only two macers of Justiciary, each holding commission under Royal sign manual,[3] and one Justiciary mace in Edinburgh and one in Glasgow, although two Courts occasionally in Edinburgh and regularly in Glasgow sit at the same time. Macers of the Court of Session, when not engaged in the Court to which they are

[1] Reg. Privy Council, 1610, viii. 614.
[2] Mackenzie, ii. 15, 217.
[3] 11 Geo. IV. & 1 Will. IV. c. 69, s. 18.

attached, are required to perform the duties of macers of Justiciary in any sitting of the High Court.[1] The mace is carried by the macer in front of the judge when he comes on to the bench, is hung up behind his seat during the sitting of the Court, and taken down and carried in front of him when the Court rises. Amongst the Romans a pursuer might by his private authority and force draw the defender before the judge, yet they had their apparators (our macers), those who summoned the ready and speeded the reluctant. The mace used with us in the Justice Court is an iron rod, which was the symbol of power, as appears by the ninth verse of the Second Psalm.[2] The rod is ensigned with an imperial crown.

Section 3.—Sittings of the High Court.

Subsection (1).—*How and for what Purposes Convened.*

1429. All sittings of the Court of Justiciary are now sittings of the High Court of Justiciary.[3] The sittings in Edinburgh are held on requisition by the Lord Advocate, and special sittings in circuit towns (*i.e.* sittings over and above the regular circuit fixtures) are also held on a similar requisition.[4] All the remaining circuit sittings are fixed by Acts of Adjournal.

1430. The sittings of the High Court may be classified as follows:—

(1) For trials or passing sentences on persons accused. Usually only one judge sits, but in cases of difficulty more may sit. The Lord Justice-General, Lord Justice-Clerk, or any one Lord Commissioner of Justiciary shall be a quorum.[5] The practice is that three or more judges sit and dispose of any difficult or important point raised,[5] and after such point is decided a single judge presides at the trial.[6]

(2) For deciding points raised in Circuit Court cases (trials) certified to the High Court. Three or more judges sit.[7]

(3) For disposing of petitions presented in respect of the *nobile officium* of the Court. Three or more judges sit.[8]

(4) For disposing of suspensions, advocations, small debt appeals from Courts in Edinburgh district, appeals taken to and certified from Circuit Courts, and appeals taken to Circuit Courts but transferred to Edinburgh in respect of no circuit sitting,[9] etc. A single judge sitting in chambers may pass the preliminary orders on bills of suspension, bills

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[1] 52 & 53 Vict. c. 54, s. 11. [2] Mackenzie, ii. tit. 15, 217.
[3] 50 & 51 Vict. c. 35, s. 44. [4] *Ibid.*, s. 46. [5] 31 & 32 Vict. c. 95, s. 1.
[6] *H.M. Advocate* v. *Brown*, 1907, 5 Adam 312 (five judges); *H.M. Advocate* v. *Breen*, 1921, J.C. 30 (five judges); *Solicitor-General* v. *A. B.*, 1913, 7 Adam 306 (seven judges).
[7] *H.M. Advocate* v. *Ryan*, 1914, 7 Adam 404 (certified from Glasgow; five judges); *H.M. Advocate* v. *Aikman*, 1917, J.C. 8 (certified from Glasgow; seven judges); *H.M. Advocate* v. *Bickerstaff*, 1926, J.C. 65 (certified from Stirling; five judges).
[8] *Sweeney, Petr.*, 1894, 1 Adam 392 (three judges); *Graham Hunter, Petr.*, 1904, 4 Adam 523 (three judges); see also *Lamond Lowson, Petr.*, 1909, 6 Adam 118.
[9] See para. 1470 *et seq.*, *infra*, Circuit Courts—Appeals.

of advocation, and appeals, and grant warrants for service, or for *interim* liberation, but to dispose finally of these bills or appeals a quorum of three judges is necessary. Cases of unusual importance or difficulty are sometimes, during the hearing or after the case is heard, sent to a full Bench.[1]

(5) Bail appeals, which may be disposed of by a single judge sitting in chambers.[2]

(6) For disposing of appeals lodged under the Criminal Appeal (Scotland) Acts, 1926[3] and 1927.[4] Three or more judges sit.

1431. The Court sitting under these last-mentioned Acts in considering an appeal against a verdict will not upset the verdict on the ground that it might not have reached the same conclusion as the jury. The Court will interfere with the verdict only if it considers such verdict unreasonable, and the Court applies the same rule in considering as to credibility of witnesses. It is for the judge or jury who heard and saw the witnesses to decide as to their credibility, unless circumstances of some special character are alleged. Miscarriage of justice is the keynote and criterion of inevitable interference with the result arrived at in the Court of first instance.[5] As to the effect of irrelevant matter being laid before the jury by the prosecution, and misdirection in law by the presiding judge, see *Slater* v. *H.M. Advocate*.[6]

1432. A single judge sitting in Chambers may—

(*a*) Grant or refuse an application for leave to appeal. (If the ground of appeal is a point of law only no leave is required.)

(*b*) Grant or refuse leave to the applicant or appellant to be present at the hearing of his application or appeal in cases where he is not entitled to be present without leave.

(*c*) Grant or refuse application for extension of time within which to appeal.

(*d*) Admit or refuse the appellant or applicant to bail.[7]

Three or more judges are required (*a*) for disposing of the appeals, or (*b*) for deciding finally as to appellants' applications ((*a*), (*b*), (*c*), and (*d*), *supra*) should any of these applications be refused by a single judge and such refusal be appealed against.[8]

Subsection (2).—*Voting.*

1433. In sittings of the High Court (except appeals under the Criminal Appeal (Scotland) Acts, 1926-27) the presiding judge has no vote unless the other members of the Court are equally divided.[9] In a

[1] Advocation—*Strathern* v. *Benson*, 1925, J.C. 40 (seven judges); Appeal—*Somerville & Barr* v. *Chalmers*, 1925, J.C. 70 (seven judges); *Mortensen* v. *Peters*, 1906, 5 Adam 121 (twelve judges).

[2] 51 & 52 Vict. c. 36, s. 5.

[3] 16 & 17 Geo. V. c. 15.

[4] 17 & 18 Geo. V. c. 26.

[5] *Webb* v. *H.M. Advocate*, 1927, J.C. 92.

[6] 1928, J.C. 94.

[7] 16 & 17 Geo. V. c. 15, s. 14.

[8] 1926 Act, s. 12 (1).

[9] Macdonald, p. 282.

Court of three judges, where the judges sitting on the right and left of the chair are of different opinions, the vote of the presiding judge determines the result.[1] Where the Court consists of four judges and they are equally divided in opinion, the judgment will be contrary to the opinion of the presiding judge.[2] In *Muir* v. *Hart*[3] Lord Dunedin said: "By the constitution of this Court I have no vote unless the other members of the Court are equally divided."

1434. In appeals to the High Court under the Criminal Appeal (Scotland) Acts, 1926–27, the determination of the Court shall be according to the voting of the majority of the members of the Court, including the presiding judge.[4] This also applies to cases certified to the High Court by a single judge, and to appeals by way of advocation from the Sheriff Court.[5]

SUBSECTION (3).—*Open Doors.*

1435. All sittings for trials must be held with open doors, *i.e.* the public is to be admitted to the Court as space permits. After the debate on relevancy is closed, the Court "shall advise the same with open doors in presence of the Pannell and Assyse and all others," except that "in cases of rapt Adulterie and the like, the said Commissioners may continue their former use and custom by causing remove all persons except parties and procurators at the leading of probation —as they shall see cause." It will be noticed that the power to close is during "leading of probation"; hence the public are only excluded from the Court during the leading of the evidence.[6] Doors are now usually closed in trials of rape, incest, sodomy, bestiality, and charges of attempts to commit any of these crimes, and also in cases of lewd, indecent, and libidinous practices and behaviour, and contravention of the Criminal Law Amendment Act, 1885, and of the Criminal Law Amendment Act, 1927. But in cases of concealment of pregnancy,[7] procuring abortion,[8] and violating sepulchres,[9] the Court refused to close the doors.

SECTION 4.—JURISDICTION OF THE HIGH COURT.

SUBSECTION (1).—*Persons.*

1436. Generally stated, every person, whether a British subject or a foreigner, charged with a crime or offence against public law committed in Scotland, is subject to the jurisdiction of the Scottish Criminal Courts.[10]

1437. Scottish peers, if charged with treason, petty treason, misprision of treason, murder, or other felony, were amenable only to their own

[1] *Campbell* v. *Maclennan*, 1 White 604. [2] *Ross* v. *Johnston*, 1886, 1 White 171.
[3] 6 Adam 601 (seven judges). [4] 1926 Act, s. 12 (1) (3). [5] *Ibid.*, s. 12 (3).
[6] See Will. & Mary, 1693, c. 43, and 10 & 11 Geo. V. c. 75, s. 8 (4); see also Defence of Realm Amendment Act, 1915 (5 Geo. V. c. 34, s. 1 (3)).
[7] *Punton*, Hume; Bell's Notes, p. 237.
[8] *Main*, Edinburgh, murder following on procuring abortion, September 1919; *Graham*, Edinburgh, 13th December 1897 (*n.r.*).
[9] *Pattison*, Edinburgh, 1814. [10] Hume, ii. 41; Alison, ii. 81; Macdonald, 2nd ed., p. 276.

order.[1] By the Felony Act, 1841,[2] this privilege was withdrawn as regards every Lord of Parliament or Peer of the Realm, but as this Act does not include Scots peers who are not representative peers, the ancient privilege still pertains to them.[3] For all offences of a lower degree the Scottish peers, like the English and British, are answerable in the ordinary Courts.[4]

1438. Members of the House of Commons may not during the sitting of Parliament and for forty days after every prorogation and forty days before the next appointed meeting[5] be confined or imprisoned on any warrant but its own, except for treason, felony, or breach of the peace. It is not clearly decided what offences fall within breach of the peace.[6] The Houses of Parliament must in every case receive immediate information of the arrest or imprisonment of any Member of Parliament.[7] The Criminal Courts, however, are not concerned with naval or military offences, or offences which are merely contrary to professional or ecclesiastical discipline or regulations.

Subsection (2).—*Subject-matter.*

1439. The jurisdiction of the High Court when sitting in Edinburgh is universal over Scotland, *i.e.* any crime committed in Scotland may be indicted for trial there. In practice the Edinburgh district embraces the three Lothians and Peebles. Crimes from other parts of Scotland are tried in Edinburgh if there is some reason which makes it expedient or more convenient that they should be tried there rather than locally.[8]

1440. In cases where crimes are committed partly in Scotland and partly elsewhere, the Scottish Courts may have jurisdiction. It is then a question of circumstances, and the test seems to be whether the main part of the act, or that part of the act which completes the crime, or takes practical effect in Scotland, was done in Scotland. If so, the Scottish Courts have jurisdiction.[9] The following cases have been tried in Scotland:—

(*a*) Where a deed was forged elsewhere but was uttered in Scotland.[10]
(*b*) Where the forgery was uttered in Scotland by being posted in Edinburgh, in a letter addressed to London.[11]
(*c*) Where goods were fraudulently obtained from Scotland by letters dispatched from England.[12]

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[1] 6 Anne, c. 11, art. 23; 6 Geo. IV. c. 66; Hume, ii. 46. [2] 4 & 5 Vict. c. 22.
[3] Anderson, Criminal Law, p. 219; but see 6 Anne, c. 11, art. 23, and 6 Anne, c. 78, s. 12.
[4] Cases of *Earl of Rosebery* and *Earl of Morton*, Hume, ii. 47, and *Earl of Mar*, 1831, Bell's Notes, p. 148.
[5] May's Parliamentary Practice, p. 107.
[6] Macdonald, p. 276; Hume, ii. 48–49; Alison, ii. 20; Act, 1701, c. 6; May, p. 113.
[7] Stephen, 14th ed., ii. 374.
[8] For crimes in circuit districts, see Circuit Courts.
[9] See *Reg.* v. *Keyn*, 1876, L.R. 2, Ex. D. 63. [10] Hume, ii. 53.
[11] See Macdonald, p. 277, and cases noted there.
[12] *Witherington*, 1881, 4 Coup. 475; see also *Bradbury*, 1872, 2 Coup. 311; *Allan*, 1873, 2 Coup. 402; *Michael*, 1842, 1 Broun 472; *M'Gregor*, 1846, Arkley 49.

(*d*) Forging banknotes where the plate had been fabricated and the notes thrown off in London.[1]

(*e*) Obtaining money from Scotland by fraudulently advertising in England.[2]

(*f*) Scottish bankrupt uplifting money in England to defraud creditors.[3]

(*g*) A crime committed in a railway train may be tried in the Courts of any locality through which the train passed.[4]

1441. In cases of treason, a domiciled Scotsman residing abroad and joining the enemy forces may be tried in Scotland as a traitor. Jurisdiction here is based on nationality.[5]

1442. Crimes committed in Scotland but in different districts therein may be tried in a Court as determined by the Lord Advocate.[6]

1443. Theft and reset are regarded as continuous crimes, being "of a continued and successive nature so as to be renewed" in a different jurisdiction by the act of the thief in holding possession of the stolen goods, and travelling onwards, with the felonious purpose of securing and disposing of his spoil.[7] If, therefore, a party be in possession of stolen property at the time of his arrest he is triable in respect only of the goods then attached to him in the Courts within whose jurisdiction he is apprehended.[8]

1444. At common law the accused cannot be tried in the Courts of the jurisdiction within which he is apprehended, in respect of aggravations (*e.g.* theft by house-breaking or by violence) committed in the jurisdiction from which he came, the jurisdiction being solely grounded on his holding possession of the stolen goods.[9]

1445. Persons ordinarily resident and carrying on business in Scotland supplying goods to the enemy, no matter in what country such persons or goods may chance to be when the goods are supplied, may be tried in Scotland,[10] but in other cases the Scottish Courts have no jurisdiction, except under special statutory authority, to try offences committed on land furth of Scotland.[11]

Subsection (3).—*Statutory Offences.*

1446. By the Coinage Offences Act [12] there is jurisdiction in the Court of either locality where the first and second utterings of base coin took

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[1] Cases of *Herries* and *M'Caffee*, Hume, ii. 54.

[2] *Allan*, 1873, 2 Coup. 402.

[3] *M'Kay*, 1866, 5 Irv. 329.

[4] Anderson, p. 220; *cf.* Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 6, s. 10 (3)).

[5] Hume, ii. 50.

[6] 1887 Act, s. 22.

[7] Hume, ii. 54; Macdonald, p. 278.

[8] See *Taylor*, Hume, ii. 55; *J. Dougherty and E. Printy*, 1824, P. Shaw, 123; *Nicol*, 1834; Bell's Notes, p. 149; *Stevenson*, 1853, 1 Irv. 341; *Gracie & Stewart*, 1884, 5 Coup. 379; Sir George Mackenzie, Works, ii. 190.

[9] Hume, ii. 55; Alison, ii. 78–79.

[10] *H.M. Advocate* v. *Hetherington*, 1915 S.C. (J.) 79, 7 Adam 663.

[11] *E.g.* Tweed Fisheries Act (11 Geo. IV. c. 54).

[12] 24 & 25 Vict. c. 99, ss. 28 and 36.

place in different localities. By the Post Office Act [1] a party may be tried in the Court of any place through which the subject-matter of the crime has passed. There is similar jurisdiction under the Foreign Enlistment Act, 1870.[2]

Subsection (4).—*Offences Committed at Sea.*

1447. Piracy, being considered as an offence against the law of nations, may be tried by the High Court irrespective of the nationality of the ship or offender or wheresoever committed.[3] In all other cases jurisdiction depends upon (*a*) the position of the ship at the time or (*b*) its nationality. There is jurisdiction if at the time the crime was committed the ship was (*a*) within territorial waters, *i.e.* within one marine league of the Scottish coast, measured from low-water mark, although the crime was committed on board or by means of a foreign ship,[4] or (*b*) within a Scottish port or harbour or navigable river or anchoring ground irrespective of the nationality of the ship or accused.[5] Jurisdiction in respect of offences committed on the high seas or in a foreign port or harbour is now mainly regulated by the Merchant Shipping Act, 1894.[6] For the purpose of giving jurisdiction under the Act every offence is deemed to have been committed either in the place in which it was committed or in which the offender may be found,[7] and Scottish Courts may try (1) any British subject charged with committing any offence on board any British ship (*a*) on the high seas or (*b*) in any foreign port or harbour; or (2) any British subject charged with committing an offence on board a foreign ship to which he does not belong; or (3) any person not being a British subject charged with an offence on board a British ship on the high seas.[8] The Scottish Courts have jurisdiction to try coinage offences committed at sea in ships which are registered at or which touch any Scottish port.[9]

Subsection (5).—*Exclusive Jurisdiction.*

1448. The High Court has the exclusive power of providing a remedy for all extraordinary occurrences not otherwise provided for in the course of criminal business,[10] and has an inherent jurisdiction to punish all acts which are criminal although previously unknown and not within any statute.[11] In new crimes created by statute, where inferior Courts are mentioned as the Court of trial, the jurisdiction of the High

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[1] 1908, 8 Edw. VII. c. 48, s. 72.
[2] 33 & 34 Vict. c. 90, s. 16.
[3] Hume, i. 480; Alison, i. 638; Macdonald, p. 250.
[4] 41 & 42 Vict. c. 73, s. 2; see Macdonald, p. 250, and cases noted there; *Mortensen* v. *Peters*, 1906, 5 Adam 121.
[5] *Lewis* v. *Blair*, 1858, 3 Irv. 16; see Summary Jurisdiction Act, 1908 (8 Edw. VII. c. 65), s. 10.
[6] 57 & 58 Vict. c. 60.
[7] *Ibid.*, s. 684.
[8] *Ibid.*, s. 686; see ss. 684–710.
[9] 24 & 25 Vict. c. 99, s. 36.
[10] Hume, ii. 59; Alison, ii. 23.
[11] Macdonald, p. 252; Hume, i. 12.

Court is not excluded, unless by express direction or necessary implication of such statute.[1] The High Court is the only competent Court to try cases of treason, misprision of treason, murder, contravention of 10 Geo. IV. c. 38, rape, deforcement of messengers, breach of duty by magistrates, corrupt disclosure of official secrets,[2] and all statutory cases in which a higher punishment than imprisonment is required.[3]

Section 5.—Circuit Courts of Justiciary.

Subsection (1).—*Justice Ayres.*

1449. The holding of provisional Courts or Justice Ayres had been in Scotland a constant part of the plan of judicial economy from the earliest times of which we have any certain account.[4] The Justiciar by himself or his deputes, in name of the Sovereign, held the King's Court according to "auld use and custome" throughout the kingdom. By Statute 1440, c. 5, it was ordained "that the Justices on the south side of the Scottis sea set their Justice Aires and hald them twise in the zeir and alswa on the north side of the Scottis Sea, as auld use and custom is." And for the purpose of ensuring fuller justice the King was directed by Parliament to attend the Ayres in person. Thus, the Parliament held at Scone in 1357 directed that the King should hold a journey of justiciary (*Iter Justicarii*) throughout the whole kingdom, and in 1488 Parliament[5] directed "our Sovrane Lord to rid in proper person about to all his aieres."

1450. The Statute 1491, c. 10, directs that Justice Ayres be "set and haldin twis in the yere anys on the griss and anys on the corne, throw the realme, and that where it shall be sene spedefull, that our Sovrane Lord move his most noble person thereto," and the Statute 1526, c. 7, directed that our Sovrane Lord "be personalie present at the halding of the said Justice Aires geif it plesis his Grace," and the statute proceeds that "na Justice Airis be halden na part without our Sovereign Lord and his Justice be present." But owing to the conditions then prevailing in Scotland it was easier to pass Acts and issue orders than to carry them into execution. Thus we find in the preamble to the Act 1587, c. 82, the Legislature which complained of the disuse "of the ancient and lovable ordour established by diverse gude laws and Acts of Parliament," for the holding of Justice Ayres relating that the ordinary course of trial for crimes was in Edinburgh, "quhair particular dittes ar sette for certain special and highest crimes" to the great trouble "and needless expences of the King's Lieges." This Act further ordered Justice Ayres to be holden as of old twice in the year (April and October) in every shire in the kingdom.

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[1] *Mackenzie* v. *M'Phee*, 1889, 2 White 188; *Craig* v. *M'Phee*, 1883, 5 Coup. 243; Macdonald, p. 251; cf. *Clark* v. *Bathgate*, 1872, 2 Coup. 195.

[2] 52 & 53 Vict. c. 52, s. 6.

[3] Macdonald, p. 282.

[4] Hume, ii. 19.

[5] Statutes (Thomson's ed.), xi. 208 (8).

SUBSECTION (2).—*Circuit Courts after* 1672.

1451. The Act for Regulation of the Judicatories, 1672, c. 40, divided the kingdom into three districts, and directed Circuit Courts to be held once a year in the month of April or May, two judges to go to Dumfries and Jedburgh, two to Stirling, Glasgow, and Ayr, and two to Perth, Aberdeen, and Inverness. But again the Orders were more definite than the execution thereof, for no Circuit Courts were held in Scotland from the end of the reign of Charles II. down to 1708. By 6 Anne, c. 6, s. 84, it was again directed that circuits be held twice in the year, but a few years later [1] the former practice of holding one circuit in the year was reverted to, except when it should please the Sovereign to issue a Special Order for holding it.

1452. In 1746 [2] it was again directed that Circuit Courts should be held regularly twice in the year, and that the order of each circuit was to be fixed by Act of Adjournal, and the days spent by the judges in circuit towns were to be six. By this Act the shires of Argyll and Bute were added to the Western Circuit, and by the Act of the following year [3] the shire of Ayr, with the district of counties appended thereto, was disjoined from the Western Circuit and attached to the Southern Circuit. The number of days to be spent by the judges in each circuit town was altered to not less than three—the judges between 1st and 20th March and 1st and 20th August were to determine how long they were to continue in each town,[4] and the Spring Circuit had to be held between 12th March and 12th May.[5] It is not now necessary for the judges to remain in any circuit town after the criminal and civil business falling to be disposed of at such town is disposed of.[6]

1453. By 9 Geo. IV. c. 29, s. 1, the High Court is directed to appoint an additional Circuit Court to be held in Glasgow "for trying criminal causes at the end of December and beginning of January yearly." Appeals which are competent at all other circuits cannot be heard at this sitting.[7] Under this last-mentioned Act it is directed, by Order-in-Council dated 18th May 1881, that three additional Circuit Courts in the year be held in Glasgow, and two additional Circuit Courts be held at Perth, Dundee, and Aberdeen. It will be noticed that Inverness and the Southern Circuits are not included in this Order.

SUBSECTION (3).—*Readjustment of Circuits.*

1454. By 9 Geo. IV. c. 29, s. 3, additional Courts may (by Order-in-Council) be held at any of the existing circuit towns, or existing Circuit Courts may be dispensed with, and under 27 Vict. c. 30, s. 1, the Sovereign is empowered (by Order-in-Council) to form new circuits or to alter the limits of existing circuits. By 15 & 16 Geo. V. c. 81, power is given

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[1] 10 Anne, c. 33. [2] 20 Geo. II. c. 43. [3] 21 Geo. II. c. 19.
[4] 23 Geo. III. c. 45, s. 1. [5] 30 Geo. III. c. 17, s. 3. [6] 1887 Act, s. 46.
[7] *Davidson*, 1884, 2 Broun 9; *Mackenzie*, 1888, 16 R. (J.) 43; 2 White 167.

to the Lords Commissioners of Justiciary by Act of Adjournal from time to time as to them shall seem necessary after consultation with the Lord Advocate:

(*a*) To alter the existing circuits of the High Court, to form new Circuits, and to fix and determine the limits of each existing or new Circuit and the districts which shall be included.[1]

(*b*) To detach any portion of the district exclusively attached to the High Court sitting at Edinburgh, and to include the same in any adjoining circuit, or to detach any district from an adjoining circuit, and to include the same in the district now attached to Edinburgh.[2]

(*c*) To fix and determine the number of Circuit Courts to be held, and the places at which the same shall be held, and also to define the periods of the year at which such Courts are to be held, and to alter the same, and to appoint the particular dates of such Courts, and to appoint that any such Circuit Courts shall be for the trial of criminal cases only.[3]

SUBSECTION (4).—*Sittings.*

(i) *General.*

1455. By the Criminal Procedure (Scotland) Act, 1887, it is declared that every sitting of the Lords Commissioners of Justiciary shall be a sitting of the High Court of Justiciary, and the ceremonies of fencing and closing Courts by proclamation of a macer are abolished (s. 46). These sittings, presided over by one or more of the Lords Commissioners of Justiciary, and formerly called Circuit Courts, are therefore now sittings of the High Court of Justiciary. Sittings of the High Court of Justiciary on circuit continue to be appointed to be held at the usual times and places at which the Circuit Courts of Justiciary were held prior to the passing of that Act, but no sitting of the Court is held at any place appointed where there are no cases indicted for trial, or where so many of those indicted have pleaded guilty at the first diet as to make it unnecessary to hold a special Court (s. 48). In the latter case provision is made for the remaining cases, *i.e.* cases remaining for trial, being brought up at any sitting to be held in any adjacent county, or any county in the same district of the country, or in Edinburgh (s. 50), and the persons who have pleaded guilty at the first diet may be disposed of at any other sitting of the High Court (s. 49). Maiden Courts, *i.e.* sittings of a Circuit Court at which there is no case to be disposed of, were thus abolished. The last Maiden Court in Scotland was held at Inverary on 27th March 1887. By the Circuit Courts and Criminal Procedure (Scotland) Act, 1925,[4] a person who has pleaded not guilty at the first diet, but afterwards at any time before the second diet gives notice that he intends to plead guilty, may be disposed of at any other sitting of the Court, and where the number of persons indicted to a sitting of the High Court who have neither pleaded guilty nor have

[1] 1887 Act, s. 1 (*a*).
[2] Sec. 1 (*b*), *ibid.*
[3] Sec. 1 (*c*), *ibid.*
[4] 15 & 16 Geo. V. c. 81, s. 2.

given notice of intention to plead guilty is such as to render the holding of a Court unnecessary, such persons may be disposed of as provided for by ss. 48 and 50 of the 1887 Act at any other sitting of the High Court.

1456. Any appeal which may have been taken to any sitting of the High Court at any of the circuit towns may, when such sitting is not held, be heard of consent of both parties at any sitting of the High Court of Justiciary at any place. Otherwise it is heard in Edinburgh.[1]

(ii) *Fixing and Holding.*

1457. The times for holding the different Circuit Courts—as distinguished from special sittings of the High Court, which will be referred to later—and the judges who are to preside thereat, are fixed by Acts of Adjournal passed by the High Court of Justiciary, under the authority of various statutes and Orders-in-Council.[2] Although in these Acts of Adjournal two judges are invariably named to discharge the duty of each circuit, any judge or judges of the Court of Justiciary may discharge that duty, notwithstanding such judge or judges may not have been specially named therefor.[3]

(iii) *Present Circuits.*

1458. The distribution of the counties and stewartries to the different circuits is now as follows:—

I. *West Circuit.*

Circuit Towns.	Shires and Stewartries.
Glasgow	Lanark, Renfrew, and Bute.[4]
Stirling	Stirling, Dumbarton,[5] Clackmannan, and Kinross.
Inveraray[6]	Argyll.

II. *North.*

Perth	Perth and Fife.
Dundee[7]	Forfar.
Aberdeen	Aberdeen, Banff, and Kincardine.
Inverness	Inverness, Ross and Cromarty, Elgin, Nairn, Sutherland, Caithness, and Orkney and Shetland.[8]

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[1] Criminal Procedure (Scotland) Act, 1887, s. 48, and Circuit Courts and Criminal Procedure (Scotland) Act, 1925, s. 2 (1), (2).

[2] See para. 1459, *infra*.

[3] 9 Geo. IV. c. 29, s. 2.

[4] Bute was transferred from the Inveraray district by Order-in-Council dated 28th November 1876.

[5] Dumbarton was transferred from the Glasgow district by Order-in-Council dated 20th November 1873.

[6] Joined to the Western Circuit on suppression of heritable rights of Justiciar, 20 Geo. II. c. 43, s. 33.

[7] Dundee was made a circuit town by Order-in-Council dated 30th November 1864.

[8] Cases from Orkney and Shetland are regularly taken to Inverness.

III. *South.*

Ayr	Ayr.[1]
Dumfries	Dumfries, Kirkcudbright, and Wigtown.[2]
Jedburgh [3]	Roxburgh, Berwick, and Selkirk.

1459. The periods for holding the different circuits at these towns are as follows, namely:

I. *West.*

Glasgow	1. December or January.[4] 2. February or March.[5] 3. Between 20th March and 12th May.[6] If a Circuit Court is held as in No. 1, this circuit is not in use to be held sooner than 20th April (see 11 Geo. IV. and 1 Will. IV. c. 37, s. 3). 4. June or July.[5] 5. July, August, September, or October. 6. October.[5]
Stirling, Inveraray	1. Between 20th March [4] and 12th May. 2. July, August, September, or October.

II. *North.*

Perth, Dundee, Aberdeen	1. January or February.[5] 2. Between 20th March and 12th May.[6] 3. June or July.[5] 4. July, August, September, or October.
Inverness	1. Between 20th March and 12th May.[6] 2. July, August, September, or October.

III. *South.*

Ayr, Dumfries, Jedburgh	1. Between 20th March and 12th May. 2. August, September, or October.

1460. The particular dates of the above circuit sittings are fixed by Acts of Adjournal, which are passed about a month before the earliest sitting fixed, and Precepts of Publication are issued to the Sheriff through the Sheriff-Clerk of each county and stewartry ordaining proclamation

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[1] Disjoined from Western Circuit and joined to Southern Circuit by 21 Geo. II. c. 19.

[2] Wigtown was detached from Ayr Circuit and attached to Dumfries by Order-in-Council, dated 3rd November 1865.

[3] Peebles was detached from the Jedburgh district by 39 & 40 Vict. c. 152.

[4] Formerly held under 9 Geo. IV. c. 29. Now fixed in terms of Act of Adjournal dated 20th July 1926 under 15 & 16 Geo. V. c. 80.

[5] Held under Order-in-Council dated 18th May 1881, and Act of Adjournal dated 12th July 1881.

[6] Used to be held between 12th March and 12th May, the former Court of Session Spring recess.

and publication to be made at the market cross of the head burgh therein, and at "the whole market crosses of all the burghs therein that none may pretend ignorance" of the circuit fixtures. Notice of the appointments is also made in the Edinburgh *Gazette*, in the leading Scottish newspapers, and on the Justiciary notice board in the Parliament House. A note shewing the fixtures is sent to all the judges. The Acts of Adjournal appoint the judges who are to preside at the several Courts, and also contain Orders in regard to certain districts, as to the number of jurors to be summoned for service. The proportions of jurors from each of the different sheriffdoms in a district are also fixed by Acts of Adjournal.

SUBSECTION (5).—*Special Sittings.*

1461. In addition to the above fixtures additional or special sittings are, on the requisition of the Lord Advocate, held by the High Court [1] in any town which may be most convenient for the trial. If such special sitting is held in a town where Circuit Courts are usually held, the jury to serve is summoned from the county or counties forming the circuit district, in proportions fixed by Acts of Adjournal, but if the special sitting is to be held in a town in which sittings are not in use to be held, the jury to serve at such sitting is drawn from the General Jury Roll of the county in which such town is situated.[2] Notices of special sittings are published in the Edinburgh *Gazette* and in the leading newspapers, and are intimated to the judges and to all officials concerned.[3]

SUBSECTION (6).—*Jurisdiction.*

1462. Although by the Criminal Procedure Act, 1887, ss. 1 and 46, Circuit Courts of Justiciary are declared to be sittings of the High Court of Justiciary, the area within which the High Court of Justiciary on circuit exercises jurisdiction is not extended, but the jurisdiction is, as formerly, limited to crimes committed within the area of the respective circuits, and to crimes committed outwith that area where by statute the delinquent is made amenable to the jurisdiction of the Court. Theft may be tried in any jurisdiction where the thief is found with the stolen property in his possession. Power is given by several statutes to try persons charged with certain crimes at the place of apprehension.[4]

1463. Where a crime has been committed partly in one county and partly in another, or where one crime following on and connected with another crime has been committed in a different county from

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[1] Criminal Procedure Act, 1887, s. 46.

[2] *Ibid.*, s. 47. A special sitting was held at Elgin on 30th July 1907.

[3] Special sittings or "Justice Courts Particular" for trying serious crimes were ordered to be held by 1525 (8) (Thomson's ed., ii. 297), "because at all times Justice Airis Generale can nocht be ready. . . ."

[4] *E.g.* 57 & 58 Vict. c. 60, s. 684; Merchant Shipping Act, 1894; Aliens Restriction Act, 1914 (4 & 5 Geo. V. c. 12); Aliens Order, 1920, Regulation 18, subs. 9; Post Office Act, 1908 (8 Edw. VII. c. 48), s. 72.

that in which the first was committed, or where several crimes which, if committed in one county, could now be tried under one indictment, are alleged to have been committed by any person in different counties in succession, a person accused may be indicted to a Court in such one of such counties as shall be determined by the Lord Advocate.[1] Where any crime is committed in any county of an existing circuit in which no sitting of the High Court of Justiciary falls to be held in ordinary course for some months thereafter, it is competent to indict the person accused to any earlier sitting of the High Court to be held in another county in an adjacent circuit district.[2] Cases may be transferred from one circuit district to another circuit district where a person accused has pleaded guilty at the first diet,[3] or where so many of the previous accused have pleaded guilty at the first diet as to render the holding of a separate Court for the remaining cases unnecessary.[4] Where a party who pleaded not guilty at the first diet intimates before the second diet a plea of guilty, or where so many persons have pleaded guilty at the first diet as to render the holding of a case unnecessary, such person or persons may be transferred to another sitting.[5] Where a person accused has pleaded guilty under s. 31 of the 1887 Act before the Sheriff, and has been remitted to the High Court of Justiciary for sentence, he may be brought before any sitting of the High Court of Justiciary at any place that may be convenient, as the Lord Advocate may order.

Subsection (7).—*Certification.*

1464. The High Court of Justiciary on circuit may certify any case commenced before it to the High Court at Edinburgh, and when this is done the certification must be to a day fixed.[6]

Subsection (8).—*Quorum.*

1465. The Act of 1672, c. 40, directs that two judges be appointed to go to each of the three circuits, and declares that the Justice-General shall be "always supernumerary in any of these Circuit Courts." Any one of the judges may dispatch business whenever it shall happen that his colleague, through indisposition or other necessary avocation, be absent, unless the Lord Justice-General was present.[7] The Act[8] provides that the Lord Justice-General may dispatch the business of the Circuit though no other judge be present. But in practice he does not go on circuit. Two judges are empowered to sit in separate Courts simultaneously at the Glasgow Circuits for the more rapid dispatch of business.[9] The first occasion on which this was acted on was on 8th January 1850, when Lord Cockburn sat in one Court and

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[1] Criminal Procedure Act, 1887, s. 22.
[2] *Ibid.*, s. 51.
[3] *Ibid.*, s. 49.
[4] *Ibid.*, s. 50.
[5] Circuit Courts and Criminal Procedure (Scotland) Act, 1925, ss. 1 (3) and 2 (1), (2).
[6] *Fraser*, 1852, 1 Irv. 1.
[7] 20 Geo. II. c. 43, s. 32.
[8] 11 Geo. IV. and 1 Will. IV. c. 69, s. 19.
[9] 11 & 12 Vict. c. 79, s. 8.

Lord Ivory in another. The practice is now regular at Glasgow Circuits. This power was later extended to the dispatch of business at the other circuit towns.[1] One of the judges at a circuit town may proceed to the next circuit town and there open the Court and dispatch business, although the other circuit be not completed.[2] In practice two judges are named in the Act of Adjournal to go to each circuit, but only one judge goes to each town (with the exception of Glasgow). Two judges usually go to Glasgow for each circuit and sit in separate Courts—the list of cases to be disposed of being divided between the two Courts. But if the calendar is a light one a single judge may dispose of all the work,[3] and such judge need not be either of those named in the Act of Adjournal.[4]

SUBSECTION (9).—*Ceremonial.*

1466. At each sitting of the High Court on circuit—whether regular or special—a Justiciary macer attends at each Court. In Glasgow, where two Courts are sitting simultaneously, one macer attends for each Court. Two of the State trumpeters also attend each sitting. If a judge is to arrive in a circuit town fully robed and there is to be a procession to his hotel, he is met at the railway station by a Justiciary macer carrying the mace and wearing gown and cap, and by two of the State trumpeters in full uniform. The trumpeters are to be mounted on horses—but probably now permission would be given by the judge to allow the trumpeters to drive or walk. A procession on entering the circuit town has not taken place for many years. Occasionally, however, a circuit procession takes place on the opening day of the sittings from the hotel where the judge is staying to the Court. In this case the judge usually holds a levee in the hotel before the procession starts, at which the Sheriffs-Principal of the district, Sheriffs-Substitute of the county, the Lord Provost or Provost, Magistrates and Town Clerk of the circuit town, advocates attending the circuit, the clergyman who is to officiate at the Court, representatives of the local Bar, and those officially engaged in the business of the Court, *i.e.* circuit clerk, procurators-fiscal, and sheriff-clerk attend. Frequently leading county personages also attend, *e.g.* the Lord-Lieutenant of the county, Convener of the county, chairman of the Territorial Association, etc. If, as is usual when a procession is to be held, a military guard is present, the judge before entering the Court inspects the guard, and if a military band is in attendance at the Court House, the judge as a Lord Commissioner is entitled to six bars of the National Anthem.

1467. When the judge goes on the bench the trumpeters blow a fanfare. He is accompanied to the bench by a clergyman, who engages in prayer, during which all stand. The Sheriffs of the district are called immediately after prayers, and on being called they stand up.

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[1] The Justiciary (Scotland) Act, 1868 (31 & 32 Vict. c. 95), s. 2. [2] *Ibid.*, s. 3.
[3] Glasgow Court, August 1927. [4] 9 Geo. IV. c. 29, s. 2.

They are called again when the ordinary criminal business is finished, and the clerk of Court addressing the public asks whether there are any complaints against them. Should any complaints be offered, the Sheriff complained against would be "intranned." [1] When the whole business, criminal or civil, is disposed of, the judge addresses first the Sheriffs and afterwards the magistrates present, and dismisses them from further attendance, and he may give directions to the latter as to the suppression of any class of crime that may be prevalent.

SUBSECTION (10).—*Sheriffs' and Magistrates' Attendance.*

1468. At the "King's Court," which is the earliest known judicial establishment in Scotland, the King in person presided, or in his absence the Justiciar, and all barons and dignified persons owed suit and presence. By several ancient statutes dealing with Justice Ayres,[2] it was directed that the Sheriffs and other dignified persons should attend both the Circuit Court and the judges to and from the boundaries of their respective counties. The Statute 8 Anne, c. 16, while dispensing with the attendance of noblemen, still imposed the duty on the Sheriffs and their deputes to attend inside "the bounds of the respective county whereof such person is Sheriff, except at the place where the several Circuit Courts of the respective districts shall be held." And the same Act imposes on the magistrates "of such cities and boroughs where the respective Courts are held, the duty to attend the said Lords of Justiciary during their abode in their respective cities and boroughs." The Heritable Jurisdiction Act, 1747,[3] transferred to the Court of Justiciary all supreme "jurisdictions, powers, and authorities which had belonged to any heritable Justiciary." Thereafter the duties of circuit attendance fell upon the Sheriff-Depute, now called Sheriff (as here used the term does not include Sheriff-Substitute), who came in place of the hereditary Sheriffs.

1469. A later statute,[4] narrating that the continuance of the circuit for six days was burdensome to "the Sheriffs and inferior Magistrates, who by law are obliged to attend the judges while they continue at the circuit town," directed that the Sheriffs and other officers should attend the judges for three whole days at least. Now the circuit judges only remain in a circuit town until the criminal and civil business is disposed of.[5] By an Order of the High Court dated 6th February 1882, it was directed that Sheriffs need attend the spring and autumn circuits only, and the Sheriffs of the Glasgow district, viz. the Sheriff of Lanarkshire and the Sheriff of Renfrew, Bute, also the winter circuit at Glasgow. The Sheriffs are therefore called only at these circuits. The Sheriff of Fife and Kinross attends as above at sittings in Perth and Stirling, Fifeshire being attached to the Perth district and Kinross-shire to the

[1] See Hume, ii. 529, 530. If absent, Sheriffs were "unlawed in 100 merks each," see Lothian's Forms of Process, p. 235.

[2] See Hume, ii. 20.

[3] 20 Geo. II. c. 43.

[4] 23 Geo. III. c. 45.

[5] Criminal Procedure Act, 1887, s. 46.

Stirling district. For cases of complaints against Sheriffs see the cases undernoted.[1] When a Sheriff is not present at any of the sittings at which it is his duty to attend,[2] the clerk of Court takes instructions from the presiding judge as to whether the attendance has been excused or he has failed to attend, and this is duly minuted in the Court books. In recent years judges have ordered the clerk of Court to write to absenting Sheriffs drawing attention to their unexplained absences. Magistrates in all the circuit towns invariably attend at all High Court sittings.

SUBSECTION (11).—*Civil Appeals to Circuit Courts.*

1470. Appeals in civil cases were not competent at the Glasgow winter circuit when this sitting was originally fixed.[3] This sitting is now held under Act of Adjournal, dated 20th July 1926,[4] and continues "until the whole criminal business . . . is concluded and no longer." Appeals are therefore still incompetent at this sitting. The High Court has power under the last-mentioned Act to appoint that any particular Circuit Court in any circuit may be for the trial of criminal cases only. Appeals are competent at other regular circuits, including all extra circuits held under Order-in-Council of 18th May 1881,[5] but are not competent at special sittings of the High Court on circuit, held under the Criminal Procedure (Scotland) Act, 1887, s. 46. Appeals from Orkney and Shetland are taken at Inverness.[6]

1471. The jurisdiction of the Circuit Court as a Court of Review as presently exercised is founded on statute, the principal—and probably the oldest—being the Heritable Jurisdiction Act, 1747.[7] Appeals must be taken in open Court at the time of pronouncing judgment, or within ten days thereafter, *i.e.* the principal appeal must be lodged in the hands of the clerk of Court, and a copy thereof served on the respondent or his procurator within this time. The service must be evidenced either by acceptance or otherwise, and the appeal must be lodged at least fifteen days before the next regular Circuit Court. For some time past the circuit appeals taken have been mainly under the Small Debt Act, 1837.[8] The grounds of appeal under the Act are corruption, or malice and oppression of the judge, and the appeal must be taken in the first instance to a Circuit Court. There are other statutes under which the only competent form of appeal is to the Circuit Court in the first instance.[9]

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[1] *Colville*, 2nd May 1720; Hume, ii. 529; *M'Kie*, 1728, Hume, ii. 530.

[2] For cases of non-attendance of Sheriffs see Minute Book for Wigtown, 19th June 1744 and Minute Book for Glasgow, 19th September 1811; Perth, April 1859; see 3 Irv. 406 n.

[3] 9 Geo. IV. c. 29, s. 1; *Davidson* v. *Gray*, 1844, 2 Broun 9; *Mackenzie* v. *M'Phee*, 1888, 2 White 167.

[4] Following on 15 & 16 Geo. V. c. 81 (the Circuit Courts and Criminal Procedure (Scotland) Act, 1925).

[5] *Sinclair* v. *Hollis*, 1881, 4 Coup. 518.

[6] *Walker* v. *Moar*, 1870, 1 Coup. 466.

[7] 20 Geo. II. c. 43.

[8] 7 Will. IV. and 1 Vict. c. 41.

[9] See *O'Brien* v. *M'Phee*, 1880, 8 R. (J.) 8; 4 Coup. 375; *Mackenzie* v. *Lang*, 1874, 2 R. (J.) 1; 3 Coup. 29.

1472. When an appeal is taken to a Circuit Court and no sitting is held at that fixture, such appeal shall be heard by the High Court at Edinburgh, or may when both parties consent be heard at any other sitting of the High Court.[1]

1473. Appeals involving points of "difficulty" or "importance" may be certified to the High Court to meet in Edinburgh. In the interlocutor certifying the appeal the date of hearing is left blank, and parties are ordained to be prepared to "discuss the same" at any time fixed for the Court. Unless there were special reasons of urgency the appeal would be taken at the next sitting of the Justiciary Appeal Court. There is no uniform rule or practice in regard to the form of the appeal. It is addressed "Unto the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, or such of their Lordships as shall be present at the next Circuit Court of Justiciary to be holden by them or one or more of their number within the City or Burgh of [Glasgow]." The appeal should be signed by the appellant or his agent.

Section 6.—Clerk of Justiciary.

Subsection (1).—*History.*

1474. In the early history of the Justiciary Court the present office of Clerk of Justiciary had its parallel in the office of Clerk to the High Justiciar or Justice-General, who exercised a supreme jurisdiction in matters criminal as well as civil. In the Act of Parliament, 1449, c. 28, his clerk is styled as Justice-Clerk, and referred to as the officer having the charge of the rolls containing the names of the persons indicted at the Justice Ayres. His business (as clerk to the Justiciar) further appears to have been (by himself and by his deputes) to take up dittays, *i.e.* to make inquisition of persons suspected of crimes, and thereon to frame indictments against these that were to be tried at the Justice Ayres or Circuit Courts; and also to make preparation for the trials on the Justice Ayres by issuing the necessary precepts for arresting the delinquents and having them served with their dittay, and summoning the witnesses against them.[2] By the Act of 1587, c. 82, a new scheme for taking up dittays was introduced, whereby those who discharged this duty did so by the authority of the King's commission; but it appears that without any new legislation the older method had been reverted to. The Justice-Clerk acted as clerk to the Justiciar so far down as the reign of Charles I., about which time he was repeatedly called upon to act as assessor to the Court in cases of difficulty or importance.

1475. Sir John Home, when appointed Clerk of Justiciary in 1663, was a judge in the Court of Session. Thereafter the officer who discharged the duties of Clerk of Justiciary was styled Depute in the Clerk-

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[1] Criminal Procedure Act, 1887, s. 48.

[2] 1424, cc. 10, 20, 33, 35, and 36; 1491, cc. 34, 35.

ship of Justiciary or Justice-Clerkship. He received his commission from the Lord Justice-Clerk, and his duties became confined to the duties of clerk of the Court of Justiciary.[1] On 17th December 1666 there is recorded a commission by Sir John Home of Rentoun (who, as above mentioned, had been promoted from the clerkship to the Bench) in favour of Thomas Gordon, writer in Edinburgh, as depute in the office of Clerkship to the Commissioners appointed for trying persons concerned in the Rebellion. On 4th June 1672 there was presented a commission granted by Sir James Lockhart of Lee, "Principal" Justice-Clerk, in favour of Robert Martin, writer in Edinburgh, as depute clerk in the office of Clerkship of Justiciary. On 7th November 1681 Thomas Skene, second son of John Skene of Halyards, advocate, presented a commission from the Lord Justice-Clerk appointing him Clerk to the Justice Court, but this commission was not recorded. It appears that about this time the King had assumed the right of making this appointment, as on 6th November 1682 Thomas Skene resigned his office, having been informed that Thomas Gordon, W.S., eldest son of James Gordon of Buthlay, Aberdeenshire, had obtained a gift and commission from the King under the Great Seal; and on the same day Thomas Gordon was received by the Court as clerk to the Justice Court during all the days of his "lifetime." Twelve years afterwards—23rd April 1694—there is recorded a letter from the King restoring to the Lord Justice-Clerk the power of naming and appointing all Clerks of Justiciary; and on the same day there is recorded a commission by the Lord Justice-Clerk to James Montgomery, younger of Lainshaw, to be Clerk-Depute in the office of Clerkship of Justiciary during all the days of his life. From this time until the passing of the Act [2] of 1839 the Lord Justice-Clerk continued to exercise the right to appoint the Clerk and Depute of Justiciary, who, in all the commissions during that period, was styled as Clerk-Depute in the office of Clerkship of Justiciary.

1476. In 1839 it was enacted that "after the present Lord Justice-Clerk and the present principal Clerk of Justiciary shall cease to hold their offices, the appointment to the offices of principal and depute clerks of the Court of Justiciary, and also of the circuit clerks of the said Court, shall, as vacancies occur, be vested in Her Majesty, her heirs and successors." [3] On 30th April 1856, in respect of a payment made to him by the Treasury, Patrick Boyle, eldest son of the Lord Justice-Clerk, renounced his office of principal Clerk of Justiciary. On 22nd May 1857 a royal warrant or commission under the sign manual in favour of Charles Neaves (who was second or assistant and clerk-depute of Justiciary), as sole Clerk of Justiciary, was recorded. His successors were appointed under a like style and title, except that in the commission granted to the present Clerk of Justiciary (appointed June 1918) the word "sole" is omitted. On appointment the clerk presents his com-

[1] See para. 1419, *supra*. [2] 2 & 3 Vict. c. 36. [3] 2 & 3 Vict. c. 36, s. 3.

mission to the Court and, the declaration *de fideli administratione officii* having been administered to him, the commission is ordered to be recorded in the Books of Adjournal.

SUBSECTION (2).—*Duties.*

1477. The Clerk of Justiciary has an office at 2 Parliament Square, Edinburgh, and his staff consists of two assistant clerks, and one clerical assistant. The hours of the Justiciary Office—to the public—are 10 a.m. to 4 p.m. (on Saturdays from 10 a.m. to 1 p.m.). The Clerk of Justiciary is empowered by his commission to grant, with the sanction of the Lords Commissioners of Justiciary, deputations to one or more fit persons. These are in use to be granted in favour of both of his assistant clerks; and such deputation is presented to the Court and recorded in the Books of Adjournal. For the purposes of (*a*) the Criminal Procedure (Scotland) Act, 1887,[1] (*b*) the Summary Jurisdiction (Scotland) Act, 1908,[2] and by Acts of Adjournal passed under the Prevention of Crime Act, 1908,[3] and the Criminal Appeal (Scotland) Acts, 1926–7, "Clerk of Justiciary" is declared to include assistant Clerk of Justiciary, and to extend and apply to any person duly authorised to execute the duties of principal Clerk of Justiciary or assistant Clerk of Justiciary. The Clerk of Justiciary attends the sittings of the High Court of Justiciary at Edinburgh. The duties of clerk to the High Court of Justiciary, when sitting elsewhere than in Edinburgh, are discharged by the first and second assistant Clerks of Justiciary or by a clerk appointed by the High Court.[4]

1478. When a sitting of the High Court of Justiciary at Edinburgh, or a special sitting of the High Court elsewhere than in Edinburgh, for the trial of criminal causes is desired, an application, in the form of a letter by His Majesty's Advocate, is made to the Court. This letter is handed by the Crown agent to the Clerk of Justiciary, who obtains the approval of the Lord Justice-General or the Lord Justice-Clerk to the sitting being held, and thereafter lays it before a judge, who adhibits his signature to the document. Thereupon the Clerk of Justiciary addresses a requisition to the Sheriff of the Lothians and Peebles, or the Sheriff of the district where the special sitting is to be held, requiring him to return to the Justiciary Office a list of persons qualified and liable to serve as jurors in terms of the Acts of Parliament, to pass upon the assize of all parties cited to the said sitting. The list of assize is printed, and one copy thereof is signed by a judge, and this signed list and copies are lodged with the sheriff-clerk of the district in which the sitting is to be held, on the same day that a warrant is issued to the Crown to serve indictments.[5] This warrant, or certified copy thereof, is also the authority for citing jurors, and witnesses for the prosecution

[1] 50 & 51 Vict. c. 35, s. 1. [2] 8 Edw. VII. c. 65. [3] 8 Edw. VII. c. 59.
[4] Circuit Clerks (Scotland) Act, 1898 (61 & 62 Vict. c. 40); see para. 1486, *infra*.
[5] Criminal Procedure (Scotland) Act, 1887, s. 38.

and person accused, and extra certified copies are issued on demand by the Crown agent, or agents for persons accused, for this purpose.

1479. After the pleas have been taken at the first diet, the sheriff-clerk transmits to the Clerk of Justiciary the record copies of the indictments containing the Sheriff's endorsements, and also all productions, if the sitting is to be held in Edinburgh, but if the sitting is to be elsewhere than in Edinburgh, the record copies of indictments are forwarded to the Clerk of Justiciary,[1] and copies of the indictments are sent with the productions to the office of the sheriff-clerk of the second diet (*i.e.* where the Circuit Court is to sit), to lie there until taken over by the circuit clerk. After receiving the record copy indictments the Clerk of Justiciary considers what number of jurors would be appropriate for the case or cases for trial, and directs the sheriff-clerk to cite the jurors accordingly. Letters from jurors on the list claiming exemption or asking relief from attendance are dealt with either by the Clerk of Justiciary or the circuit clerk, who uses his own discretion or consults the Court (usually the judge who is to preside).

1480. When an accused person or an appellant or applicant under the Criminal Appeal (Scotland) Act, 1926, is not able to furnish himself with, or is not represented by, agent or counsel, the Clerk of Justiciary, from a rota of agents and counsel for the poor, intimates to those next in turn that it is their duty to act.

1481. At the second—or trial—diet the clerk calls over the jury list, noting jurors who are absent without sufficient cause being offered and sustained, and takes directions of the Court as to fining such absentees. The trials then proceed in their order, the clerk calling the diet, balloting the jury, reading to them the charge, either at length, as directed by the Criminal Procedure (Scotland) Act, 1887, s. 4, or a summary of the charge approved by the judge—in cases of length or complexity —as directed by the Circuit Courts and Criminal Procedure (Scotland) Act, 1925,[2] swearing the jury, reading special defences, if any, and minuting all the proceedings in the Court Minute Book.[3] He records the verdict, and signs all sentences other than death sentences, the latter being signed by the judge, and furnishes extracts of the sentences to the prison officials, as their warrants for removing and detaining the prisoners. At the conclusion of the trial the Clerk of Justiciary gives instructions as to the disposal of all productions lodged in terms of the Act of Adjournal, dated 27th October 1926. Certain productions, such as lethal weapons, medical reports, extract convictions, etc., are kept in the Justiciary Office. He also attends sittings of the High Court for disposal of cases certified from Circuit Courts, and sittings for disposal of applications and petitions presented to the Court.[4]

1482. If the prosecution is at the instance of a private party, with the consent of the Lord Advocate, or if the Court allows the private

[1] Criminal Procedure (Scotland) Act, 1887, s. 29.
[2] 15 & 16 Geo. V. c. 81, s. 3.
[3] See Books of Adjournal, para. 1497, *infra*.
[4] See High Court Sittings, para. 1430, *supra*.

party to proceed with the prosecution without the consent of the Lord Advocate,[1] the prosecutor presents to the Court a Bill for criminal letters. If the prayer of the Bill is granted, the criminal letters following thereon are signed and signeted with the seal of the High Court by the Clerk of Justiciary. The list of productions annexed is also signed by him.

1483. On the morning of the first meeting of the Court in October a draft rota is prepared of the judges who are to preside at the various Circuit Courts for the following year, and when approved of is entered in a rota book, signed by the Lord Justice-General, and printed. Copies of the approved rota are then sent to the judges.

1484. At the stated periods provided by statute and Order-in-Council for fixing the sittings of the Circuit Courts, the Clerk of Justiciary obtains from the various sheriff-clerks a note of days to be avoided in fixing the sittings, and informs the judges concerned thereof, and they then fix the dates on which the Circuit Courts are to be held. When all the dates of the fixtures are arranged, the clerk frames the appropriate Act of Adjournal, which is passed by at least three judges and signed by the senior judge present. As directed in the Act of Adjournal, the clerk issues to the Sheriffs of each circuit district, through the sheriff-clerks of all the counties and stewartries, precepts ordaining publication to be made by them that Circuit Courts are to be held at the times and places specified, and he also requisitions the Sheriffs of the sheriffdoms in which the circuit towns are situated to return a list of assize to serve at the respective circuits. This list, having been printed and signed by a judge, is lodged, along with copies thereof, with the sheriff-clerk of the town wherein the Circuit Court is to be held. If there are no cases for trial at any of the towns where sittings are appointed to be held, the Clerk of Justiciary sends notices to all the sheriff-clerks of such circuit districts that no sitting is to be held, and directs them to publish notices to this effect.

1485. After each circuit the records of Court and indictments are brought back to the Justiciary Office. The principal indictments form part of the Circuit Books of Adjournal.[2]

1486. Under the Criminal Appeal (Scotland) Acts, 1926–7, the Clerk of Justiciary is the clerk of Court. He attends the sitting of Court and records the proceedings. He also has to perform the duties prior to and following on this Court, all as directed by the principal Act and the Act of Adjournal thereunder, dated 27th October 1927. A separate set of books is kept for sittings of this Court.

1487. The Clerk of Justiciary keeps in his office at Edinburgh all minute books and records of the High Court, whether sitting at Edinburgh or elsewhere, and prepares and keeps the Books of Adjournal for all sittings of the High Court of Justiciary. He has in his custody all the records of the Court, and the important documents in cases

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[1] *Coats* v. *Brown*, 1909, 6 Adam 19. [2] See para. 1502, *infra*.

brought before the High Court of Justiciary and Circuit Courts for several centuries.

1488. All appeals taken to the High Court of Justiciary at Edinburgh, bills of suspension of criminal or quasi-criminal convictions or sentences, bills of advocation, and documents forming the initial steps in other processes of review competent before the High Court of Justiciary, are lodged with the Clerk of Justiciary, who, if any deliverance is required, forthwith lays them before a judge. So soon as a diet for hearing appeals is fixed by the Court, the Clerk of Justiciary puts out in the rolls the cases for hearing, and intimates the sitting to the agents or parties in each case by sending a printed notice of the list of cases. He attends the sitting of the Justiciary Appeal Court, writes the interlocutors, extracts, as required, the decrees of the Court, and grants any warrants that may be necessary.

1489. All fees payable in processes of review before the High Court of Justiciary are payable in Law Courts stamps, and a return of these fees is made by him to the Exchequer. Formerly the Clerk of Justiciary acted as auditor of all accounts of expenses found due in the High Court of Justiciary, where the expenses were not modified by the Court; but by the Courts of Law Fees (Scotland) Act, 1895, the duty of auditing those accounts has been transferred to the auditor of the Court of Session. The accounts themselves are, in the first place, lodged with the Clerk of Justiciary, and after taxation by the auditor of the Court of Session are returned to the Clerk of Justiciary as final custodier. The Clerk of Justiciary supervises the annual return by Sheriffs and chief magistrates of royal burghs of the progressive state of the registers, and lodges these returns with the Lord Clerk Register.[1]

Section 7.—Circuit Clerks of Justiciary.

1490. The duties of clerk to the High Court of Justiciary, when sitting elsewhere than in Edinburgh, were formerly discharged by three specially appointed clerks, called circuit clerks—one for the north, one for the south, and one for the west circuits. These clerks held their appointments *ad vitam* by commission under Royal sign manual, and were not restricted to official duties, being allowed to engage in private practice. Thereafter it was provided by the Criminal Procedure (Scotland) Act, 1887,[2] as amended by the Clerks of Session (Scotland) Regulation Act, 1889,[3] that on these offices of circuit clerks becoming vacant they should not be filled up, and that the duties of clerk to the High Court, when sitting elsewhere than in Edinburgh, should be performed by the first assistant Clerk of Justiciary and the Depute Clerks of Session, in rotation as therein provided. This arrangement was found to be unsatisfactory and inconvenient. Accordingly the Circuit Clerks (Scotland) Act, 1898,[4] repealed the sections of the Acts of 1887 and 1889

[1] 49 Geo. III. c. 42, and Act of Adjournal dated 3rd November 1887.
[2] 50 & 51 Vict. c. 35, s. 73. [3] 52 & 53 Vict. c. 54, s. 10. [4] 61 & 62 Vict. c. 40.

above referred to, and provided that the duties of clerk to the High Court of Justiciary, when sitting elsewhere than in Edinburgh (the offices of circuit clerks having now ceased by the death of the several occupants), are to be performed by the first and second assistant Clerks of Justiciary for the time being.

1491. The High Court has power to appoint a clerk or clerks to perform the duties of circuit clerk at any town or towns, whether circuit towns or not, when the business of the Court requires such appointment to be made, on such terms as may be fixed by the Treasury, and such appointment is usually made by the judge at the commencement of the sittings. The minute appointing the extra or *interim* clerk proceeds on the narrative that the circuit clerks are presently indisposed or engaged in other public business. The declaration *de fideli* is administered to him, and the judge signs the minute.

1492. The preparation for and the work during the sittings of the Court on circuit are similar to those of the Clerk of Justiciary at sittings of the High Court in Edinburgh. The circuit clerk has no assistant in Court. When a jury is secluded overnight—as in murder cases—the clerk has to stay in the hotel in which the jury is accommodated, to confer with them, if necessary, in regard to any private matter, business or domestic. The clerk takes over any circuit appeals lodged, and records the judgment of the Court thereon. Circuit appeals, though referred to in the Court Minute Book, are not entered therein, but are recorded in an Appeal Book, one of which is kept for each circuit district. At the end of the day's sitting the clerk issues an extract of the sentence passed on each of the prisoners dealt with, and at the close of the circuit has either to obtain a receipt for, or have possession of, all the productions —Crown and exculpatory—lodged.[1]

1493. A return of all untried prisoners for the circuit district is made to the Court at all regular sittings,[2] and these the clerk examines, and calls the attention of the Court to any case where the period of detention before trial calls for inquiry. At the conclusion of the sittings the clerk reports any fines or forfeitures made by the Court to H.M. Exchequer, and makes a return to the Prison Commissioners for Scotland giving particulars as to the crime, sentence, previous convictions admitted in evidence, etc., in all cases in which a conviction has been obtained or an order has been pronounced (*e.g.* where insanity of the prisoner has been established).[3]

Section 8.—Acts of Adjournal.

1494. In the institution of the Justiciary Court by the Act 1672, c. 40, s. 6 of the part "Concerning the Justices" provided: "That it be left and recommended to the judges of that Court to regulate the inferior officers thereof, and order every other thing concerning the said Court." Under

[1] See Act of Adjournal, dated 27th October 1927

[2] 9 Geo. IV. c. 29, s. 4.

[3] 40 & 41 Vict. c. 53, s. 65.

this provision, which continued to the Justiciary Court the powers inherent in it as the Court of the King's Justiciar, or Justice-General, the Court has passed Acts of Adjournal dealing with the forms of procedure in the Court; with the appointment of circuit ayres; with the duties and conduct of the various officials of the Court; with the number and proportions of assizers to be summoned from different counties; with exemption from jury service, etc. All Acts of Adjournal are passed by a quorum of judges, and are signed by the presiding judge "I.P.D." As the Supreme Court of criminal jurisdiction in Scotland, and also under various statutes, the High Court has passed Acts of Adjournal which affect the procedure of the inferior Criminal Courts. Thus, under 6 Geo. IV. c. 23, an Act for the better regulation of the Sheriff, Stewart, and Burgh Courts of Scotland, the High Court passed the Act of Adjournal, 17th March 1827, which is still of force in trials by jury in the Sheriff Courts. Most statutes dealing with criminal procedure contain a clause empowering the High Court to make, by Acts of Adjournal, such rules and regulations as may be necessary to carry into effect the provisions of the statute.

1495. Acts of Adjournal are recorded in the High Court Minute Books and the Books of Adjournal, and are, if of general interest, published in the Edinburgh *Gazette*, and circulated to officials concerned. Some statutes also require that Acts of Adjournal, passed to carry out their provisions, be laid within a certain period before both Houses of Parliament. Acts of Adjournal lose their force under the same rules as are applicable to Scots Acts of Parliament: they may go into desuetude or they may be repealed, either expressly or by implication, and that either by Act of Adjournal or by statute.[1]

Section 9.—Books of Record.

1496. The Books of Record in the High Court of Justiciary in Scotland (excluding the record of sittings held under the Criminal Appeal (Scotland) Act, 1926, and sittings of the High Court as an Appellate Court, to hear suspensions, appeals, etc., for both of which a separate set of books is kept) consist of (1) the Minute Book written in Court by the clerk of Court, and (2) the Books of Adjournal.

1497. The Minute Book used for sittings for criminal trials at Edinburgh gives a full record of all the proceedings, *inter alia*, the names and designations of the pannels, the charges (summarised) as laid in the indictment, procurators for the Crown and for the pannels, a full "transcript of the procedure at the first diet as endorsed on the Record copy of the indictment," [2] such transcript including objections to relevancy, etc.,[3] special defences,[4] and pleas of guilty and remits.[5] Thereafter the sundry steps or minutes of proceedings are recorded,

[1] See Adam, Acts of Adjournal (1886).
[2] Criminal Procedure (Scotland) Act, 1887, s. 40.
[3] *Ibid.*, ss. 29, 31, 32, 33. [4] *Ibid.*, s. 36. [5] *Ibid.*, s. 31.

including the names of the assize, the names—and formerly, but not now, the depositions—of witnesses for Crown and defence, decisions of the Court on any point arising in the course of the trial, pleas of the pannel, a list of all previous convictions admitted in evidence,[1] and any extra or unusual incident, viz. illness of juror, witness, or pannel, continuation minutes day by day until the conclusion of the Court, Court orders when jury is secluded overnight fully detailed, and verdict and sentence.

1498. Prior to 1st August 1849 all sentences were signed by the judge, but by Act of Adjournal of that date all sentences are now authenticated by the signature of the clerk of Court, except capital sentences, which are still signed by the judge or judges present. All Acts of Adjournal passed by the Court are engrossed at length and signed by the judge in the chair I.P.D. Petitions for, or appeals against refusal of, bail, and generally all petitions addressed to the High Court, are fully described, but are not engrossed at length, in the Minute Books, but the interlocutors and Orders pronounced thereon are fully extended. When an appeal is lodged against any High Court conviction or sentence under the Criminal Appeal (Scotland) Act, 1926, this is noted on the margin of the Minute Book opposite the record of the case, and the result of such appeal is also noted. Cases certified from Circuit Courts and the proceedings and judgments following thereon are also recorded.

1499. In the Minute Books are also recorded commissions, *e.g.* appointing the Lord Justice-General, the Lord Justice-Clerk, the Lord Advocate, the Solicitor-General, deputations in favour of advocates depute, commission to the Clerk of Justiciary, deputations to assistant clerks, and commissions to macers of Justiciary, and also certain orders of the Court.[2]

1500. Remissions of sentences are not now recorded in the Minute Books, but a note of each remission of a High Court sentence is marked on the margin of the Minute Book opposite the sentence to which it has reference. Prior to 1681 the evidence of witnesses was not reduced to writing, but from that date down to 1748, and in murder cases down to 1782, the whole evidence was taken down *verbatim*.

1501. A full and correct copy of the Minute Book for sittings at Edinburgh is written out, and now the relative principal indictments and petitions are bound along with it as an appendix, the books so made up are what are specially known as the "Books of Adjournal."

1502. The Minute Books of the Circuit Courts contain the same full record of the proceedings in the cases disposed of as is found in the Edinburgh Minute Books. The presence or absence of the Sheriffs, when they are called, is also noted. Appeals taken to the Circuit Court are referred to but are not entered in the Minute Book. These are entered in a separate (appeal) book. There are separate Minute Books for each of the circuit districts—north, south, and west. Two books are in constant use in Glasgow, as two Courts sit at the same time, and

[1] Criminal Procedure (Scotland) Act, 1887, s. 67.

[2] *E.g.* see Order *re* transmitting Lists of Assize to Justiciary Office, 1858, 2 Irv. 754.

an extra Minute Book for each of the northern and southern districts is used when occasion requires.

1503. Prior to 1890 no Books of Adjournal were kept for the Circuit Courts, so that had the Minute Books been lost or destroyed during transit these could not have been replaced. One Minute Book for the northern circuit (September 1849) had a narrow escape when the mail coach was upset in a swollen stream "and the clerk's papers floated down the stream but were recovered." [1] In terms of an Act of Adjournal (13th May 1890) the principal indictments, containing the record of proceedings at the preceding diet,[2] list of cases, printed list of assize, and an abbreviated note in the form of a schedule containing the particulars of the proceedings in the cases, are now bound yearly and form the circuit Books of Adjournal.

1504. A separate Minute Book (as well as a complete and separate set of books) is kept for sittings of the High Court when sitting under the Criminal Appeal (Scotland) Acts, 1926–7, but no books corresponding to the Books of Adjournal are made up.

1505. The record of the proceedings of the High Court in its appellate jurisdiction (*i.e.* disposing of suspensions, advocations, or appeals) consists of the various processes and a chronological list of them kept in a scroll book, and in an indexed register called the Justiciary Appeal Book.

1506. In the earliest Justiciary Court Books it is impossible to distinguish between Minute Books and Books of Adjournal. The oldest book of Justiciary commences in November 1493, and covers the period to 1504. Thereafter there is a gap of about three years. The next volume extends from 1507 to 1513, and contains "ayres" in the southern district as well as sittings in Edinburgh. Then there is a gap—the Flodden period—of eleven years up to 1524. The Minute Book commencing at this date covers the period to 1531, and thereafter there are many gaps. After the restoration of King Charles II. (1672) the records are almost continuous. The earliest Book of Adjournal as distinct from Minute Books covers the period 1536–47, and there are several gaps to the commencement of the seventeenth century, after which they are almost continuous. The Circuit Books, as distinct from the Ayres of the Justiciar, begin in the year 1658, but are irregular till 1708, after which they run almost continuously.

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[1] See Cockburn's Circuit Journeys, p. 354.
[2] Criminal Procedure (Scotland) Act, 1887, s. 29.

JUSTIFIABLE HOMICIDE.

JUVENILE OFFENDERS.

See CRIME.

KAIN.

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Section 1.—Definition.

1507. The word "kain" or "canum" was used in ancient charters to signify the tribute or duty payable to the superior by his vassal. It consisted of poultry, eggs, cattle, "custom wedders," or any produce of the land other than grain. The term is still, though rarely, employed to signify part of the reddendo in feu-charters.[1] In modern times, however, it is more frequently found in leases, and even in last century it was usual to stipulate that a certain number of kain fowls ("flying customs")—or so many fish in a tack of salmon fishings—should form part of the rent. This custom still exists in certain districts of Scotland, its chief justification being that it helps to neutralise fluctuations in prices.[2]

Section 2.—Convertible and Inconvertible Kain.

1508. Such prestations are usually convertible into money at a rate agreed on, but sometimes they are not so; and this distinction is important in the valuation of property according to rental. In a sale of lands the established rule is that where by the terms of the lease kain are convertible into money they are computed in the rental; where not so convertible, they are not computed.[3] In a modification or sale of teinds the rule is different, for it has been decided that, where in such cases kain are *bona fide* put into the lease, they are not to be included in valuing the rental, even if convertible into money.[4] In questions between the lessee and a singular successor no distinction is made between convertible kain and kain which are not convertible.[5]

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[1] *Hope* v. *Aitken*, 1872, 10 M. 347.

[2] Rankine, Leases, 2nd ed., p. 290; Ross, Lect., ii. 236, 495; Hunter, Landlord and Tenant, ii. 297.

[3] Hunter, i. 478; Bell, Leases, i. 226; *Chalmers* v. *Cuningham*, 1735, Mor. 14159; *A.* v. *B.*, 1749, Mor. 13317; *Mitchell* v. *Anderson*, 1773, Mor. 14159; *Earl of Morton* v. *Murray's Reprs.*, 1793, Mor. 13872.

[4] Ersk. Inst., ii. 10, 32, and note; Connell on Titles, i. 201; *Maxwell* v. *Duke of Queensberry*, 1747, Mor. 15748; *Adam* v. *Heritors of Cushney*, 1752, Mor. 15743.

[5] Hunter, i. 478.

KENNING TO THE TERCE.

See TERCE.

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KINSHIP.

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Section 1.—Degrees of Kinship.

1509. The relationship to each other of persons in the same line of kindred, that is, of persons sprung from a common ancestor, is measured by what are termed "degrees of kinship." It may be said generally that each generation constitutes one degree of kinship; but, as some difference of practice has existed in counting the degrees owing to the different systems of the Roman and the Canon Law, it will be necessary to state their respective methods.

1510. The Roman Law method of computation is as follows: In the direct line, one degree is counted for each generation up to and including the common stock. Thus, the son, being in the first generation, stands in the first degree of relationship to his parents, the grandson in the second degree to his grandparents, and so forth. In the oblique or collateral line, that is, amongst those sprung from a common ancestor, but who are not descendants or ascendants of each other, such as brothers, uncles, or cousins, the computation proceeds by counting the generations from one of the persons up to the common stock, and thence downwards to the other. Thus, brothers are related to each other in the second degree as there is one generation from one to the father, the common stock, and one generation thence to the other brother. First cousins are in the fourth degree, as two degrees remove the one from the grandfather, the common stock, and there are thence two degrees to the other. An uncle is to his nephew in the third degree, as the uncle is one degree, the nephew two degrees, distant from the common stock.[1]

1511. The Canon Law computation is the same as that of the Roman Law as regards the direct line. As regards the oblique or collateral line there is this difference: the degree of kinship is arrived at by counting the number of generations between the person furthest removed from the common ancestor and that ancestor. Thus, brothers are to each other in the first degree, as both are in the same generation equally one

[1] See Ersk. i. 6, 9; Bankt. i. 5, 37 and 38; Fraser, H. & W. i. 105, 106; Institutes, iii. 6; Digest, xxxviii. 1.

degree removed from the father, the common ancestor. Similarly, first cousins are in the second degree, as each is two degrees from the common ancestor; but an uncle and his nephew are in the second degree, as the nephew, the furthest removed, stands two generations from his grandfather, the common ancestor.[1]

1512. Up to the Reformation the Canon Law computation was universally followed in this country, and even after that date it is still found in use, as, for example, the Statute 1567, c. 15, which refers to cousins-german as "seconds in degrees of consanguinity and affinity." In modern times, however, the Roman Law system has been more approved, and is now in general use amongst Scottish lawyers.

Section 2.—Full and Half Blood.

Subsection (1).—*German.*

1513. Persons are said to be german, or connected by full blood, who are born or descended of the same father and mother.[2] In Scotland, relationship of full blood is reckoned to extend as far as the evidence of propinquity will reach.[3]

Subsection (2).—*Consanguinean and Uterine.*

1514. The half-blood relationships are two—consanguinean and uterine. Consanguinean relations are those born of or descended from the same father; uterine relations those born by or descended from the same mother, but not from the same father. According to the law of Scotland the rules relating to the degree of kinship within which marriage is forbidden are the same whether the parties be related of the whole or of the half blood.[4] Half-blood relations are called in intestate succession amongst the collaterals of the deceased according to certain rules, for the discussion of which see Succession.

Section 3.—Affinity.

1515. As regards the degrees of kinship within which marriage is prohibited, relations by affinity stand in the same position as those by consanguinity; "and the rule of computing its degrees is, that the relations of the husband stand in the same degree of affinity to his wife in which they were related to the husband by consanguinity, which rule holds *ex converso* in the case of the wife's relations." [5]

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[1] See Fraser, H. & W. 107; Dict. de droit Can., *sub voce* "Degré de Parenté"; Decretal, iv. 14.

[2] Bell's Prin., s. 1651.

[3] Craig, ii. 17, s. 11; Ersk. iii. 10, 2; Stair, iii. 3, 47; Bell's Prin., s. 1652.

[4] Ersk. i. 6, 9; Hume, i. 448.

[5] Ersk. Inst. i. 6, 8, 9; see *Fenton* v. *Livingstone*, 1861, 23 D. 366, per Lord Curriehill at p. 377; *Purves' Trs.* v. *Purves*, 1895, 22 R. 513.

Section 4.—Agnate.

1516. A person's agnates are those of his kindred who are related to him through his father. According to the Roman Law, a person's agnates were persons related to him through males; but that definition does not hold in the law of Scotland, for the children of a sister of a person's father are classed among his agnates.[1] When both parents of a child have died without nominating a tutor, the nearest male agnate of twenty-five years of age is entitled to the office, and is called tutor-at-law. The nearest male agnate of a pupil orphan has a right to intervene as to the child's custody.[2] In actions of choosing curators, the minor is pursuer and his nearest agnates are called as defenders. In cognitions the nearest agnate is usually pursuer, though another near relative may pursue; but in any case where a person is found insane, the nearest agnate of full age has the right to become his guardian. As such he has the custody of the ward's estate.

Section 5.—Cognate.

1517. According to the Roman Law, a person's cognates were those of his relatives who were connected with him by the interposition of one or more females; while his agnates were persons related to him through males only. Thus the son of a person's sister was a cognate, the son of a brother an agnate. But in the later Roman Law cognate was used in a wider sense, and included all blood relations. Thus agnates were only a particular class of cognates. The cognatic family was the family of the *jus gentium*, the agnatic that of the *jus civile*. *Cognatio* had its foundation in natural relationship or consanguinity. It was created by blood, and could not be lost, whereas *agnatio* could be artificially created by adoption and marriage, and artificially lost in various ways by a person passing out of the *patria potestas*. In the law of Scotland the cognates of a person are those of his relatives who are connected with him through his mother. His kinsmen to whom he is related through his father are his agnates, even though they are connected with him through a female.[3] A cognate is entitled to the custody of an orphan pupil in preference to the tutor-at-law;[4] and while the custody of the estate of a lunatic is given to his agnate, the custody of the person of a lunatic is usually given to the nearest cognate.

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[1] Stair, iii. 4, 8; Bell's Prin., ss. 2078, 2111; Mackay, Manual, 496, 500.
[2] *Reilly* v. *Quarrier*, 1895, 22 R. 879.
[3] Ersk. i. 7, 4; Bankt. i. 728; Stair, iii. 4, 8, 34; Bell's Prin., s. 2078.
[4] *Higgins* v. *Boyd*, 1821, 1 S. 50.

KIRK.

KIRK SESSION.

See CHURCH.

KIRK OR MARKET.

See DEATHBED.

KNAVESHIP.

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